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THE LAW

RELATING TO THE

HIRE-PURCHASE SYSTEM

WITH AN APPENDIX OF FORMS

BY

ROBERT DUNSTAN,

OF GRAY'S INN AND THE WESTERN CIRCUIT; BARRISTER-AT-LAW

LONDON:

SWEET & MAXWELL, LIMITED,

3, CHANCERY LANE.

1910.

PREFACE.

It is hoped that this little book will be of use not only to the practising lawyer, but also to that large public interested either in the lending or hiring of goods.

The Author has attempted to bring within the compass of a handy volume the law relating to the Contract of Hire-Purchase.

Where possible the head-notes of the more important cases are set out, and the forms of agreements used in a few of the cases have been included in the text for comparison with those now in use.

Much has been said and written against this kind of contract, but the system has been widely adopted, and is undoubtedly popular. The Author ventures to suggest that the chief defect in the law as it at present stands is the absence of any system of registration which might offer a means of protection to persons who innocently purchase goods from a fraudulent hirer. Such protection

could probably be most easily secured by a system of local registration in the County Courts.

The Author begs to acknowledge the great assistance he has derived from the "Encyclopædia of Forms and Precedents," and to express his thanks to Mr. A. M. Wilshere for the many valuable suggestions given during the preparation of the work, as well as to Mr. M. D. Severn, Librarian, Gray's Inn, for his help in compiling the Index of Cases.

R. D.

1, Elm Court,
Temple, E.C.
July, 1910.

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HIRE-PURCHASE.

CHAPTER I.

INTRODUCTION.

A HIRE-PURCHASE agreement is a contract, usually in writing, under which an owner lets furniture or goods of any description out on hire to the hirer, and further agrees that the furniture or goods shall become the property of the hirer on his making a certain number of payments known as instalments. The essential characteristics of the contract are :—

(i.) The delivery of the goods to the hirer, who obtains *possession* thereof ;

(ii.) The *property* in the goods remaining in the owner ;

(iii.) The hirer's option of purchase by completing the payment of the instalments, or to determine the hiring by returning the goods to the owner.

This contract to hire with an option to purchase

or determine the hiring is now by far the most common form of hire-purchase agreement (*a*). Another form, however, is in use, and is dealt with as a separate agreement (*b*).

Bailments. — The contract of hire-purchase belongs to the class of contracts known to the English Law as contracts of bailment. According to Blackstone the term "bailment" is derived from the French *bailler*—to deliver (*c*), and under a contract of bailment the actual or constructive possession of the goods must be transferred by the owner (bailor) or his agent to the other party, known as the bailee. Blackstone further defines the contract of bailment as the "delivery of goods to another person for a particular use" (*d*), and again as "'*Bailment*' is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee" (*e*). It must be noticed that the word "*trust*" used here and in other definitions of the contract of bailment is not intended to have the same meaning as it has when technically used in connection with real property (*f*).

(*a*) *Post*, p. 12.
(*b*) *Post*, p. 39.
(*c*) 2 Bla. Com. p. 451.
(*d*) *Ibid.*, p. 396.
(*e*) *Ibid.*, p. 451.
(*f*) See Beale, Law of Bailments, 1900, p. 6.

In the case of *Coggs* v. *Bernard* (*g*) (1704), Lord Holt, C.J., in his judgment therein, gave a clear and authoritative pronouncement on the subject of bailments. He there describes six classes of bailments, and cites as authority the Civil Law. In his classification the hire of goods for reward is the third class, called *locatio et conductio.*

A more simple division is into three:—

(i.) Bailments exclusively for the benefit of the bailor;

(ii.) Bailments exclusively for the benefit of the bailee;

(iii.) Bailments for the benefit of both the bailor and bailee;

Under this classification the contract of the hire of goods is a contract of bailment for the benefit of both parties.

In all bailments, including that of hire-purchase, the goods are delivered to the bailee, but the ownership remains in the bailor, who is said to have the "general ownership" in the goods, whilst the bailee has a "special property," or what is called a "qualified ownership" in them.

The bailee has possession of the goods, and the right to possess and deal with them according to the terms of the agreement. He has, also, an

(*g*) 2 Ld. Raymond, 909, at p. 912.

insurable interest in them (*h*). He may sue for any injury to or interference with the goods, and recover damages from any person or persons so interfering with them (*i*). The bailee is bound to take care of the goods bailed, and the degree of care and diligence required by the law varies now, as it did under the Civil Law, according to the kind of bailment (*k*). An ordinary degree of skill is required in bailments in which both parties benefit by the transaction; but where either party benefits the more, so is the degree of diligence required by the bailee varied—slight care being required where the bailor is benefited, great care where the bailee is alone benefited. The hire of goods for reward, with or without an option to purchase, forms a contract of bailment in which both parties are benefited; and the general rule now accepted as to the duty of the hirer in regard to the goods hired is that he is bound to take the ordinary care of a prudent man, but no more (*l*), and it follows that he is not liable for reasonable wear and tear.

An act on the part of the bailee entirely inconsistent with the terms of the bailment determines the contract and the right to possess the goods

(*h*) *Walters* v. *Monach, etc., Co.*, 5 E. & B. 870.
(*i*) *The Winkfield*, [1902] P. 42.
(*k*) *Coggs* v. *Bernard*, 2 Ld. Raymond, p. 912.
(*l*) *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413; *Sanderson* v. *Collins*, [1904] 1 K. B. 628.

reverts to the owner (*m*), for instance, where the bailee of hired goods sells them (*n*).

The position of a bailor in bailments for hire is shortly this:—He must give the hirer peaceful possession of the goods according to the terms of the contract, and he is under an obligation to see that the goods let out are reasonably fit and suitable for the purposes for which they are intended (*o*).

The early form of a hire-purchase agreement was simply to the effect that the owner agreed to let the goods to the hirer in consideration of the payment of a rent, and further agreed that after the payment of an agreed number of instalments the goods were to become the property of the hirer. The agreement usually contained provisions under which the owner could put an end to the hiring in certain contingencies, such as non-payment of the rent, or removal of the goods from the hirer's premises without consent in writing from the owner. Under it the owner of the goods was fully protected, for the hirer was bound to purchase the goods, and he could not confer a good title upon a *bonâ fide* purchaser or pledgee as against the owner.

(*m*) *Fenn* v. *Bittleston*, 7 Exch. 152; *Donald* v. *Suckling*, L. R. 1 Q. B. 585.

(*n*) *Cooper* v. *Willomatt*, 1 C. B. 672; *Marner* v. *Banks*, 16 W. R. 62; *Bryant* v. *Wardell*, 2 Exch. 479; *post*, p. 89.

(*o*) *Post*, p. 60; *Vogan & Co.* v. *Oulton*, 81 L. T. 435.

This position of affairs was altered by the passing of the *Factors Act*, 1889 (*p*). In the case of *Lee* v. *Butler* (*q*) this class of hiring agreement in reference to the validity of the title of a purchaser from the hirer came up for consideration. It was held in this case that the hire-purchase agreement was in effect an agreement of sale with deferred payment, the hirer being bound to carry out his contract to purchase, and that it was an agreement to buy goods within the meaning of sect. 9 of the *Factors Act*, 1889, and therefore the purchaser had a good title to the goods in question (*r*).

This decision seriously affected the security of the owner's position in regard to claims by purchasers and pledgees of the hirer. For under the *Factors Act*, 1889 (*s*), and the *Sale of Goods Act*, 1893 (*t*), the hirer being in possession of the goods could sell or pledge them, and the *bonâ fide* purchaser or pledgee without notice of the owner's claim had a perfectly good title to the goods.

In 1895 it was, however, decided in the leading case of *Helby* v. *Matthews* (*u*) that where under a

(*p*) 52 & 53 Vict. c. 45.
(*q*) [1893] 2 Q. B. 318; see also *Hull Rope Co.* v. *Adams*, 73 L. T. 446.
(*r*) *Post*, p. 30.
(*s*) 52 & 53 Vict. c. 45.
(*t*) 56 & 57 Vict. c. 71, s. 25.
(*u*) [1895] A. C. 471.

hiring agreement the hirer could at any time determine the hiring by returning the goods to the owner, such an agreement was not a contract of sale, but one of hire terminable at the will of the hirer, who, in addition, had an option of purchase, and that therefore he had not "agreed to buy goods" within the meaning of sect. 9 of the *Factors Act*, 1889 (*x*). This case finally settled the form of hire-purchase agreements, which are now drawn with a clause (*y*) permitting the hirer to determine the hiring at any time, and thus the owner is protected from the risk of a wrongful disposal by the hirer giving a good title to a third person.

Under certain circumstances hire-purchase agreements are still drawn without the option to the hirer to put an end to the agreement by returning the goods to the owner (*z*). These agreements come within the decision in the case of *Lee* v. *Butler* (*a*) and are within the *Factors Act*, 1889 (*b*), sect. 9, and the *Sale of Goods Act*, 1893, sect. 25 (*c*).

(*x*) 52 & 53 Vict. c. 45.
(*y*) *Post*, p. 13.
(*z*) *Post*, p. 29.
(*a*) [1893] 2 Q. B. 318.
(*b*) 52 & 53 Vict. c. 45.
(*c*) 56 & 57 Vict. c. 71.

CHAPTER II.

THE HIRE-PURCHASE AGREEMENT.

Nature of the Contract.—The contract of hire-purchase, as already defined, is a contract of hire with an option of purchase, in which the owner of goods lets them out on hire to the hirer for a fixed term, at an agreed rental to be paid at weekly, monthly, or quarterly periods, as instalments, and the owner, in addition to letting the goods out, further agrees that if the hirer keeps them for the agreed period and regularly pays the rent they shall become the hirer's property. The agreement forms what is known as a *simple contract* in distinction from a contract under seal where the formalities of sealing and delivering must be observed.

The general rule is that a simple contract need not be in writing (*a*), and in general a hire-purchase agreement does not come within any of the statutory exceptions to this rule (*b*). Where, however, the contract is not capable of being performed within

(*a*) See Chitty on Contracts, 15th ed., p. 71.
(*b*) *Ex parte Brooks*, 23 Ch. D. 261.

the space of one year, no action can be brought upon such contract unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party sought to be charged therewith, or some other person thereunto by him lawfully authorised (*c*). In practice the agreement is in writing, often a printed form, and the document is signed before any steps are taken under the contract. It is a rule that where parties to a contract record the terms agreed upon in a written instrument, such as a hire-purchase agreement, they are bound by the terms so set out, and no evidence is admissible to vary or contradict the terms of the agreement (*d*). Where the defendant let a house and furniture to the plaintiff by a written agreement, evidence of a previous parol promise by the defendant to put in more furniture was tendered at the trial and rejected (*e*). Although parol evidence is not admissible to vary or contradict a written instrument, it is admissible in some cases to explain an ambiguity (*f*). Parol evidence may also be given to show that either of

(*c*) Sect. 4 of the Statute of Frauds (29 Car. II. c. 3). See *Melsom* v. *Stafford*, 80 L. T. 590 ; *Dollar* v. *Partington*, 84 L. T. 470 ; both cases of ordinary hire : see also *Smith* v. *Neale*, 2 C. B. N. S. 67.

(*d*) *Hitchin* v. *Groom*, 5 C. B. 515 ; *Meres* v. *Ansell*, 3 Wils. K. B. 275.

(*e*) *Argyll* v. *Duke*, 32 L. T. 320.

(*f*) *Shore* v. *Wilson*, 9 Cl. & F. 565 ; *Smith* v. *Thompson*, 8 C. B. 44 ; Chitty on Contracts, 15th ed., p. 115.

the parties to the contract acted as agent for another person (*g*). It may also be given to prove a usage of a trade which should be read into the agreement (*h*). Finally, parol evidence is always admissible to defeat a written contract on the ground of illegality, duress, or fraud (*i*).

For an agreement to be valid it must possess all the requisites of a simple contract (*k*). There must be a mutual assent of the parties to the contract, and there must be a *consensus ad idem* as to the subject-matter of the contract (*l*). An offer on the part of one of the parties does not become an agreement until there is an acceptance by the other party, and such acceptance must be communicated to the offering party (*m*). It is essential that there should be a good and valid consideration, or the agreement is not enforceable (*n*). In the case of a hire-purchase agreement the owner, in consideration of a periodical payment of instalments, agrees to let out the goods and to give the hirer the option of purchase. From the hirer's point of view the privilege of exercising the option and the price of

(*g*) *Higgins* v. *Senior*, 8 M. & W. 834.
(*h*) *Spicer* v. *Cooper*, 1 Q. B. 424.
(*i*) *Wright* v. *Crookes*, 1 Scott, N. R. 685 ; *Doe* v. *Ford*, 3 Ad. & E. 649 ; Anson on Contracts, p. 286.
(*k*) Chitty on Contracts, 15th ed., p. 8.
(*l*) *Van Praagh* v. *Everidge*, [1903] 1 Ch. 434.
(*m*) *Brogden* v. *Metropolitan Rail. Co.*, 2 App. Cas. 692.
(*n*) Chitty on Contracts, 15th ed., p. 21.

the goods are included in the sum paid to the owner by way of rent.

The contract must not be an immoral one, for the law prohibits everything *contra bonos mores*:—

Where the defendant, a prostitute, was sued by the plaintiffs for the price of hire of a brougham; and it was found in fact by the jury that the plaintiffs knew her to be a prostitute, and had lent the brougham knowing that it would be used as part of her display to attract men, it was held that they could not recover the price (*o*).

The test is knowledge on the part of the plaintiff —"it is well established . . . that if a person makes a contract with the knowledge that another intends to apply its subject-matter to an immoral purpose he cannot recover upon it" (per J. Mellor) (*p*). A contract to sell clothes to a prostitute, where knowledge was not proved, has been held good (*q*). These decisions are of considerable importance to dealers in furniture, for it is submitted that, on these authorities, contracts to let goods to prostitutes where there is knowledge of their character and to what use the furniture would be put, would be unenforceable.

(*o*) *Pearce* v. *Brooks*, L. R. 1 Ex. 213.
(*p*) *Taylor* v. *Chester*, L. R. 4 Q. B. 309, at p. 311.
(*q*) *Bowry* v. *Bennett*, 1 Camp. 348; see and compare *Lloyd* v. *Johnson*, 1 Bos. & P. 340.

Form of a Hire-Purchase Agreement.—The following form of a hire-purchase agreement contains the clauses usually inserted in agreements for the hire-purchase of furniture.

An Agreement made the day of 191 , *Between* The Southern Furnishing Co., Ltd., of 24, High Street, W. (hereinafter called the owners) of the one part, and John Doe, of 21, Gate Street, W. (hereinafter called the hirer) of the other part.

1. The owners shall let on hire and the hirer shall take the chattels specified in the schedule hereto upon the terms and conditions following.

2. The hirer shall :—

(a) Pay for the hire to the owners so long as the hirer thinks fit to continue the hire without previous demand the sum of £ per quarter in advance, the first quarterly payment to be made on the signing hereof, and the payment of each subsequent quarter to be paid at the expiration of each succeeding period of three calendar months.

(b) Keep the said chattels in good and substantial order (damage by fire included) in his own custody at his address as given in this agreement, and shall not sell, remove, or part with the possession of the same without the previous consent in writing of the owners.

(c) Permit all persons authorised by the owners at all reasonable times during the hiring to inspect the condition of the said chattels.

(d) Duly and punctually pay the rent, rates, and taxes payable for and in respect of the premises wherein

the said chattels may for the time being be, and produce the receipts therefore to the owners on demand.

3. If the hirer during the hiring :—

(a) Shall make default in punctually paying any quarterly instalment ; or

(b) Shall be adjudicated a bankrupt, or compound or arrange with his creditors ; or

(c) Shall have any execution or distress levied on his goods or effects ; or

(d) Shall fail to observe and perform the stipulations herein contained and on his part to be observed and performed ; or

(e) Shall do or suffer any act or thing which may prejudice the owners' rights of ownership ;

it shall be lawful for the owners to retake and resume possession of the said chattels, and for that purpose to enter upon any premises occupied by the hirer.

4. The hirer may put an end to the hiring by returning the said chattels at his own cost to the owners.

5. If twelve quarterly payments shall be duly paid by the hirer in manner hereinbefore provided, the said chattels shall become the property of the hirer, but until such payments shall have been made in full the same shall remain the property of the owners.

6. If the hiring is determined by the owners or by the hirer in manner herein provided, all hire (and damages for breach of agreement) up to the date of such determination shall be paid by the hirer to the owners, and no credit or allowance in respect of payments previously made shall be made or allowed to the hirer.

7. If the owners shall grant to the hirer any time or indulgence, the same shall not affect the owners' strict rights under this agreement.

Parties to the Contract.—It will be observed that the heading of the agreement states the date of the contract, and identifies the parties. The capacity to be a party to a hire-purchase agreement is governed by the general law concerning the capacity to contract (*r*). The law assumes that the assenting parties to an agreement are competent to contract. From this presumption it follows that where a party claims exemption from liability to perform a contract on the ground of incapacity this want of capacity must be strictly proved by the person claiming the exception.

The following persons in relation to their capacity to contract should be considered:—

Infants.—An infant is a person under twenty-one years of age. From that age a person has an absolute legal capacity to contract. Under the Common Law all contracts of an infant, except for necessaries, were voidable.

The law is now governed by the *Infants' Relief Act*, 1874 (*s*), which provides that:—

(*Section* 1.) "All contracts, whether by specialty or by simple contract, henceforth entered into by infants

(*r*) See Chitty on Contracts, 15th ed., p. 153.
(*s*) 37 & 38 Vict. c. 62.

for the repayment of money lent or to be lent, or for goods supplied (other than for contracts for necessaries), and all accounts stated with infants, shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter except such as now by law are voidable."

(*Section* 2.) "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

The present position of the law is that under *section* 1 certain specific contracts are absolutely void (this must be read as meaning "incapable of ratification" so as to charge the infant, otherwise an infant could not sue on a contract partly executed by him (*t*)), and under *section* 2 no contract whatsoever can be ratified after full age.

On a contract for *necessaries*, an infant is now, as he always was, liable, and in deciding the question of what are and are not *necessaries* the infant's age, state and degree must be taken into consideration (*u*). It is provided under the *Sale of*

(*t*) See Chitty on Contracts, 15th ed., p. 160; *Warwick* v. *Bruce*, 2 M. & Sel. 205.

(*u*) *Wharton* v. *MacKenzie*, 5 Q. B. 606; *Hans* v. *Slaney*, 8 T. R. 578.

Goods Act, 1893 (*x*), sect. 2, that where *necessaries* are sold and delivered to an infant, he must pay a reasonable price therefor, and that "*necessaries*" mean goods suitable to the condition of the life of the infant and to his actual requirements at the time of the sale and delivery. An infant has been held liable for the hire of horses, when suitable to his rank and fortune (*y*). In another case, a racing bicycle was held to be a necessary for an infant earning 21*s*. a week (*z*).

The supply of furniture or goods to an infant on a hire-purchase agreement would be good provided that the furniture or goods were necessary to his maintaining his position in life. It has been held that an infant is liable for a necessary dwelling (*a*), and it seems to follow that he would be held liable for necessary furniture to furnish the house. Necessaries for an infant's wife are necessaries for him, and he is liable to pay a reasonable price for them (*b*).

Infancy is a personal privilege, and although an infant cannot be sued on a contract he may sue the other party. But an infant cannot maintain an action for specific performance (*c*).

(*x*) 56 & 57 Vict. c. 71.
(*y*) *Hart* v. *Prater*, 1 Jur. 623.
(*z*) *The Clyde Cycle Co.* v. *Hargreaves*, 78 L T. 296.
(*a*) *Lowe* v. *Griffith*, 1 Scott, 458.
(*b*) *Rainsworth* v. *Fenwick*, 1 Stra. 168.
(*c*) *Flight* v. *Bolland*, 4 Russ. 298.

An infant, who has received goods and paid for them—that is, has taken benefit under the contract—cannot repudiate the sale so as to recover back the amount paid. Thus, where—

An infant hired a house, and agreed with the landlord to pay £100 for the furniture in the house, and he paid £60 down and gave a promissory note for the balance. After a few months occupation of the house and use of the furniture, he came of age. He then took proceedings to set the contract aside and to recover the £60 paid for the furniture. It was held that he was not entitled to recover the amount paid by him to the landlord, but, the contract being void, he obtained relief from the promissory note (*d*).

It is no answer at law to a plea of infancy that the infant fraudulently represented himself to be of full age, and that the plaintiff acting on this representation entered into the contract with him (*e*). But equity granted relief against an infant in such a case, on the ground of an equitable liability resulting from fraud (*f*). It is probable that under the *Judicature Acts* such relief could now be obtained in the King's Bench Division. The representation by the infant must be an express one for such relief to be granted. No inference that an

(*d*) *Valenti* v. *Canali*, 24 Q. B. D. 166.
(*e*) *Johnson* v. *Pye*, 1 Sid. 258; *Lemprière* v. *Lange*, 12 Ch. D. 675; see also *Levene* v. *Brougham*, 24 Times L. R. 801.
(*f*) *Ex parte Unity Joint Stock Bank*, 27 L. J. Bank. 33.

infant is of full age can be drawn from the mere fact that he is engaged in a trade (*g*).

Where goods have been delivered to an infant under a contract of bailment and there has been no fraudulent concealment of infancy, the owner cannot bring trover to recover the goods so long as the agreed term of the bailment exists. However, on the termination of the bailment, either by lapse of time or by any act on the part of the infant, so inconsistent with the terms of the bailment as to entitle the owner to treat it as at an end, as, for instance, a sale or pledge of the goods, the owner may sue the infant for conversion (*h*).

An infant may be sued for an independent trespass committed by him to the goods bailed. The wrongful act must be outside the contract altogether and not a mere breach. Where an infant hired a horse, and rode it an improper distance and thereby injured it, it was held that the improper riding was a mere excess of the hirer's rights under the contract and that the infant was not liable (*i*). Where, however, an infant hired a horse and jumped it, although he knew it to be in an unfit condition and had been expressly forbidden from jumping, it was held that the jumping was an independent

(*g*) *Ex parte Jones*, 18 Ch. D. 109.
(*h*) Clerk and Lindsell on Torts, 15th ed., p. 47.
(*i*) *Jennings* v. *Rundall*, 8 T. R. 335.

tort, and that he was liable for injuries resulting to the horse therefrom (*k*).

An infant sues by his next friend and defends an action by a *guardian ad litem* (*l*).

Married Women.—Under the Common Law a married woman was not capable of making a valid contract, and a husband, on marriage, became liable for all his wife's ante-nuptial contracts and debts.

The law relating to the contracts of married women is now regulated by the *Married Women's Property Acts*, 1882 *and* 1893 (*m*).

First, in regard to ante-nuptial contracts. Under the Act of 1882 a husband is liable for his wife's ante-nuptial debts to the extent of assets he acquires by the marriage. He may be sued on them together with or separately from his wife, and he is liable even after her death to the extent of the assets he received with her. In addition to the husband's liability, the wife herself at Common Law was liable for debts contracted before marriage, and the above-named Acts leave that liability untouched. Judgment can be obtained against her personally on them (*n*), though in practice it is usual to sue both husband and wife together.

(*k*) *Burnard* v. *Haggis*, 14 C. B. N. S. 45.
(*l*) R. S. C., 1910, Ord. XVI., rr. 16, 18, 19, 20, 21; Annual Practice, 1910, p. 190.
(*m*) 45 & 46 Vict. c. 75, and 56 & 57 Vict. c. 63.
(*n*) *Robinson* v. *Lynes*, [1894] 2 Q. B. 577.

Secondly, as to contracts made after marriage. Under the *Married Women's Property Acts* a married woman can contract in respect to, and to the extent of, her separate estate, and her contracts bind her separate property, but not herself personally. A married woman carrying on a trade separately from her husband is liable to the bankruptcy law in respect of her separate property (*o*).

A husband's liability for his wife's contracts, when living together, forms part of the law of agency. There is a presumption, when a man and wife are living together, that the wife has her husband's authority to pledge his credit for domestic purposes (*p*). This presumption not only applies to a wife, but to a man's housekeeper, whether wife, mistress, or servant. The presumption extends only to *necessaries*—that is, to articles for domestic and personal use suitable to the station in life of the husband. The presumption may be rebutted by the husband proving that his wife was sufficiently provided for apart from the contract in question, or that he had prohibited his wife from pledging his credit (*q*). If a husband has allowed his wife to deal with a tradesman, he must give

(*o*) Sect. 1 of the 1882 Act; *Re Debtor, Ex parte Debtor*, [1898] 2 Q. B. 576; *Re Lynes*, [1893] 2 Q. B. 113.
(*p*) *Debenham* v. *Mellor*, 6 App. Cas. 24.
(*q*) *Jolly* v. *Rees*, 15 C. B. N. S. 628.

that tradesman express notice not to give his wife credit or he will be bound by her contracts (*r*).

When husband and wife are living apart, the presumption is that the wife cannot pledge her husband's credit. Where, however, a wife is living away from her husband owing to his conduct or desertion, she has an implied authority to pledge his credit for necessaries.

Lunatics and Drunken Persons.—A contract made by a lunatic or a drunkard can be repudiated by him, but not by the other party. In order to make the contract voidable on his part he must have been so incapable at the time of making the agreement as not to know what he was about, and his condition must have been known to the other party (*s*). The contract being voidable only, a drunken man, on becoming sober, can ratify a contract made by him when drunk (*t*).

Formalities of the Contract.—It has already been noticed that, although a hire-purchase agreement is usually in writing, it need not be so (*u*), not coming within any of the statutory exceptions to the general rule. Nor need the agreement be registered under the *Bills of Sale Acts* or any other statute. The only formality required by law is

(*r*) *Debenham* v. *Mellor*, 6 App. Cas. 24.
(*s*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599.
(*t*) *Matthews* v. *Baxter*, L. R. 8 Ex. 132.
(*u*) *Ante*, p. 8.

that the agreement requires to be stamped under the provisions of the *Stamp Act*, 1891 (*x*).

The Act provides that no unstamped document shall be given in evidence, except in criminal proceedings (*y*), and it is the duty of the officer of the court to call to the attention of the court the absence of, or the insufficiency, of the stamp (*y*).

Formerly, a hire-purchase agreement, drawn as in *Lee* v. *Butler*, was exempt from stamp duty, under exception 3 under the heading "Agreement or any Memorandum of Agreement" in the first schedule to the *Stamp Act*, 1891. But under the *Finance Act*, 1907 (*z*), sect. 7, an *ad valorem* stamp duty is imposed on all hire-purchase agreements. This section includes both agreements for hire-purchase drawn so as to impose on the hirer an absolute obligation to pay all the instalments and so purchase the goods, and those agreements in which the hirer can terminate the hiring by the return of the goods.

The following is the form of memorandum as to the stamp duty on hire-purchase agreements issued by the Inland Revenue authorities :—

These agreements which were formerly :—(1) exempt where their terms imposed on the purchaser an obligation

(*x*) 54 & 55 Vict. c. 39.
(*y*) *Ibid.*, s. 14.
(*z*) 7 Edw. VII. c. 13.

to pay all the instalments of hire and to purchase the goods, or (2) chargeable with the duty of 6*d.* (under hand) or 10*s.* (under seal) where the instalments of hire were not payable in advance, or (3) chargeable with "Bond, Covenant," etc., duty where the instalments of hire were payable in advance, are by the provisions of sect. 7 of the Finance Act, 1907, chargeable WITH THE UNIFORM DUTY OF 6*d.* IF UNDER HAND, OR OF 10*s.* IF UNDER SEAL.

This section reads as under :—

"7. Any agreement for or relating to the supply of goods on hire, whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied, shall be charged with stamp duty as an agreement, or, if under seal or in Scotland with a clause of registration, as a deed, as the case requires, and the exemption numbered (3) under the heading 'Agreement or any Memorandum of an Agreement,' in the first schedule to the Stamp Act, 1891 (which exempts agreement for the sale of goods), shall not apply in the case of any such agreements."

Agreements, the matter whereof is not of the value of £5, are exempt from duty—*see* Exemption (1) under the head of "Agreement" in the first schedule to the Stamp Act, 1891.

The duty of 6*d.* may be denoted either by an impressed Inland Revenue stamp or an adhesive postage stamp. If an adhesive stamp is used, it must be cancelled by the person by whom the agreement is first executed. If an impressed stamp is required, the duty must be paid within fourteen days from the date on which the document was first signed.

CHAPTER III.

THE BILLS OF SALE ACTS, 1878 & 1882.

A BILL of Sale is an instrument used to transfer personal goods from one person to another. The Act of 1878 (*a*) applies to bills of sale given otherwise than as security for money, and the 1882 Act (*b*) applies to all bills of sale given to secure the payment of money. The law relating to bills of sale has an important bearing on the construction of the hire-purchase agreement (*c*).

The Bills of Sale Act, 1878, defines bills of sale as including assignments, transfers, declarations of trust without transfer, inventories of goods with receipts thereto attached, or receipts for purchase-moneys of goods, and other assurances of chattels, and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any

(*a*) 41 & 42 Vict. c. 31.
(*b*) 45 & 46 Vict. c. 43.
(*c*) See Reed on Bills of Sale Acts, 13th ed., p. 54.

personal chattels, or to any charge or security thereon shall be conferred.

The Acts provide that certain formalities must be observed in drawing bills of sale, and that they must be registered.

In general, a hire-purchase agreement is not subject to the Bills of Sale Acts, for, when the agreement is in ordinary form, no right of property at law or in equity passes to the hirer. Therefore a *bonâ fide* hire-purchase agreement need not be registered (*d*).

It is important that a hire-purchase agreement should contain a clause expressly stating, as in *clause* 5 of form given above (*e*) that the property in the goods shall not pass to the hirer until the whole of the instalments have been paid. In the absence of such a clause the power to seize the goods in default of payment of any of the instalments might make the document a bill of sale (*f*).

By an agreement in writing the "owners and lessors" of a gas engine agreed to let, and the "lessee" agreed to hire, the engine at a rent to be paid by instalments amounting in all to £240; upon payment in full the agreement to be at an end and the engine to become the property of the lessee, but until payment in full to

(*d*) *Ex parte Crawcour, Re Robertson*, 9 Ch. D. 419; quoted as *In re Robertson, Ex parte Lewin & Co.*, 47 L. J. Bank. 94.

(*e*) *Ante*, p. 13.

(*f*) *McIntyre* v. *Crossley*, [1895] A. C. 457; see also *Ex parte Emerson, Re Hawkins*, 41 L. J. Bank. 20.

remain the sole and absolute property of the lessors. The owners were given certain rights as to possession and sale of the engine if the lessee should become bankrupt. The lessee paid the first instalment, and became bankrupt while the engine was in his possession; some instalments being overdue, the lessors took no steps to recover the balance, or sell. The assignee in bankruptcy having seized the engine, the lessors applied for its delivery. *Held*, that upon the true construction of the agreement the property in the engine never passed to the lessee, but remained in the lessors, that the transaction was therefore not within the Bills of Sale Act, and that the lessors were entitled to the engine. (*McIntyre* v. *Crossley*.)

No difficulty arises on hire-purchase agreements of the direct kind, as, for instance, those between dealers in furniture and their customers; but where debts are secured by means of a series of transactions, one of which is a hire-purchase agreement, then a question under the Acts often arises. For example, where a tenant in arrear with rent sold his furniture to his landlord, taking a new lease of the house and furniture with a schedule of the property sold, containing a clause entitling him to redeem the furniture for the price paid, registration was held unnecessary, there being a real sale before and independent of the lease (*g*). An actual

(*g*) *Victoria Dairy Co.* v. *West*, 11 Times L. R. 233; see also *North Central Waggon Co.* v. *Manchester, etc., Rail. Co.*, 13 App. Cas. 554.

and complete sale followed by a hire-purchase agreement does not come within the Acts, even if the effect of the whole transaction is to secure the payment of money (*h*). But if the sale, though actual, is only part of one security to be completed by a hire-purchase agreement, then the transaction would come within the Acts (*i*). Or again, where an inventory of goods and receipt, together with a hiring agreement, is given and taken as security for the payment of money the Acts would apply (*k*).

The court will decide each case according to its merits. Enquiry as to the real truth and substance of the transaction is made notwithstanding the form the transaction took. Where—

The plaintiff executed a deed, by which he assigned chattels absolutely to the defendants, and a hiring agreement, by which he hired the chattels from the defendants. These documents did not represent the real transaction between the parties, their intention being merely to create a security for money. The documents were not registered as required by the Acts. A question arose and it was held that the court must disregard the form and look to the true nature of the transaction, that the documents amounted to a bill of sale, and were void for want of registration (*l*).

(*h*) *Ex parte Collins, Re Yarrow*, 59 L. J. Q. B. 18.
(*i*) *French* v. *Bomberard*, 60 L. T. 48; *Jones* v. *Tower Furnishing Co.*, 61 L. T. 85; *Phillips* v. *Gibbons*, 5 W. R. 527.
(*k*) *Re Watson*, 25 Q. B. D. 27; *McIntyre* v. *Crossley*, [1895] A. C. 457.
(*l*) *Madell* v. *Thomas & Co.*, [1891] 1 Q. B. 230.

Again, where—

M., who had made a contract to buy a hotel and its furniture, being unable to find all the money, agreed with a wine merchant that he should provide £2,000. The wine merchant went to the vendor and paid him £2,000, the vendor giving a receipt for that sum as the purchase-money of the furniture. The same day the wine merchant and M. signed a hire-purchase agreement by which the wine merchant let, and M. hired, the furniture for £2,412, to be paid by instalments, the furniture not to become the property of M. till all the instalments were paid. The purchase of the hotel was then completed and M. took possession. After paying some of the instalments M. became bankrupt. It was held that the circumstances showed that as a matter of fact the sale to the wine merchant was only colourable, that the transaction between the wine merchant and M. was really a loan upon the security of the hire-purchase agreement, and that the agreement, not having been registered under the Bills of Sale Acts, was void as against M.'s creditors (*m*).

Where the transaction is in fact within the Acts, a hire-purchase agreement cannot be made valid by registration, for the Bills of Sale Act, 1882, requires all bills of sale for securing the payment of money to be made in the form given in the schedule of the Act (*n*).

(*m*) *Mellor* v. *Maas*, [1903] 1 K. B. 226, affirmed by *Maas* v. *Pepper*, [1905] A. C. 102; see also on this point, *Hooper* v. *Ker*, 76 Law Times, 307; *Brown* v. *Blain*, 1 Times L. R. 158; *Ex parte Odell*, *Re Walden*, 10 Ch. D. 76; *Beckett* v. *Tower Assets Co.*, [1891] 1 Q. B. 638.

(*n*) 45 & 46 Vict. c. 42, s. 9; *Ex parte Parsons*, 16 Q. B. D. 532.

CHAPTER IV.

THE FACTORS ACT, 1889, AND THE SALE OF GOODS ACT, 1893.

A HIRE-PURCHASE agreement must be considered in relation to the *Factors Act*, 1889 (*a*) and *The Sale of Goods Act*, 1893 (*b*).

Sect. 9 of the *Factors Act*, 1889, provides :—

"Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller (*c*), possession of the goods or the documents of title to the goods, the delivery or transfer by that person or a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

Under *sect.* 2 of this Act a mercantile agent in possession of goods with the owner's consent, has

(*a*) 52 & 53 Vict. c. 45.
(*b*) 56 & 57 Vict. c. 71.
(*c*) *Cahn* v. *Pocketts' Bristol Channel Co.*, [1899] 1 Q. B. 643.

power to sell or otherwise dispose of the goods in the ordinary course of business and can pass a good title to the goods.

The Sale of Goods Act, 1893 (*d*), by sect. 25, sub-sect. 2, provides :—

"Where a person, having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods, or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

Therefore under these sections, if a hire-purchase agreement amounts to *an agreement to buy goods*, and the hirer sells or otherwise disposes of the goods, the purchaser or pledgee will obtain a good title to the goods as against the original owner.

The effect of the *Factors Act*, 1899, on a hire-purchase agreement came up for consideration in the leading case of *Lee* v. *Butler* (*e*). In this case—

A hire-purchase agreement in writing was entered into on May 5, 1892, between W. E. Hardy, a furniture

(*d*) 56 & 57 Vict. c. 71.
(*e*) [1893] 2 Q. B. 318.

dealer, and Helen Caroline Lloyd, the terms of which (so far as material) were as follows :—

First: The said W. E. Hardy agrees to let on hire unto the said H. C. Lloyd, hereinafter called the hirer, who agrees to take on hire upon terms hereinafter expressed, the furniture, goods, and chattels mentioned and specified in the schedule hereunder written.

Second: The said hirer for herself agrees, subject as hereinafter provided, to pay to the said W. E. Hardy, as and by way of rent for the hire and use of the said furniture, goods, and chattels, the respective sums and at periods following: that is to say, the sum of £1 on May 6, and the further sum of £96 4*s.* on August 1, 1892.

The third, fourth, and fifth clauses relate to the removal of the furniture, payment of rent, rates and taxes on the hirer's premises, and to the right of seizure in case of the hirer's default.

The fifth clause concludes with :—

The said W. E. Hardy for himself hereby agrees that when and so soon as the said hirer shall have well and truly made all payments of rents hereinbefore reserved, and performed all the stipulations and agreements hereinbefore on her part contained, the rent and payments hereinbefore mentioned and reserved for the said furniture, goods, and chattels shall thereupon cease, and the aforesaid furniture, goods, and chattels shall thenceforth be and become the sole and absolute property of the said hirer. But it is expressly declared and agreed that no property or interest in the said furniture, goods, and chattels other than as tenant as aforesaid shall vest in the said hirer until the whole of the said payments of

rent hereby reserved, amounting together to the sum of £97 4*s.*, shall have been actually made by her as hereinbefore provided.

A schedule of the articles of furniture followed.

The hirer before the payment of the second instalment sold the goods to the defendant without notice that they were not hers, and he, acting in good faith and with no notice of the plaintiff's right, received them. The agreement was held to be an agreement to purchase, and that the sale and delivery to the defendant was within the provision of sect. 9 of the Factors Act, and therefore valid and the defendant had a good title to the goods. (*Lee* v. *Butler.*)

Again, where—

W. had obtained possession of goods from the plaintiffs under an agreement by which W. agreed to hire the goods, value £23, "and to pay the sum of 12*s.* 6*d.* per month for the hire thereof, commencing with the date of this agreement, and payable in advance on the seventh day of each succeeding month until the full sum of £23 be paid, at which time, and on the completion of such payments, the said company agree to give up all claim to the said goods." There was a stipulation that in default of payment, W. would give up possession of, and that the plaintiffs might seize the goods; and there was a declaration that the goods should remain the property of the plaintiffs until the sum of £23 was paid, and that they were only lent on hire. There was no option to the hirer to give back the goods and thereby determine the hiring. *Held*, that W. was in possession of the goods under an agreement to buy within the meaning of

sect. 9 of the Factors Act, 1889, and that a transfer by way of pledge by him to the defendant, who received the goods in good faith and without notice of the claim of the plaintiffs, was valid (*f*).

It will be noticed that the agreements in the above cases contain no clauses enabling the hirers to return the goods and thus avoid further payments of rent under the agreement.

The leading case of *Helby* v. *Matthews* (*g*), on which the modern form of hire-purchase agreement depends, deserves close attention.

In this case the agreement was in the following form :—

"This agreement, made the 23rd day of December, 1892, between Charles Helby, of 22, Baker Street (hereinafter called the 'owner') of the one part, and Charles Brewster, of 24, Chester Street, Kennington Road, S.E. (hereinafter called the 'hirer') of the other part, witnesseth that the owner agrees at the request of the hirer to let on hire to the hirer a pianoforte, No. 896, maker Rass, and in consideration thereof the hirer agrees as follows:—1. To pay the owner on the 23rd day of December, 1892, a rent or hire instalment of ten shillings sixpence (10*s.* 6*d.*); and 10*s.* 6*d.* on 23 of each succeeding month. 2. To keep the said instrument from injury (damage by fire included). 3. To keep the

(*f*) *Thompson* v. *Veale*, 74 L. T. 130.
(*g*) [1895] A. C. 471.

said instrument in the hirer's own custody at the above-named address, and not to remove the same (or permit or suffer the same to be removed) without the owner's previous consent in writing. 4. That if the hirer do not duly perform this agreement, the owner may (without prejudice to his rights under this agreement) terminate the hiring and retake possession of the said instrument. And for that purpose leave and licence is hereby given to the owner (or agent and servant, or any other person employed by owner) to enter any premises occupied by the hirer or of which the hirer is tenant, to retake possession of the said instrument, without being liable to any suit, action, indictment, or other proceedings by the hirer, or anyone claiming under the said hirer. 5. That if the hiring should be terminated by the hirer (under clause A below), and the said instrument be returned to the owner, the hirer shall remain liable to the owner for arrears of hire up to the date of such return, and shall not, on any ground whatever, be entitled to any allowance, credit, return or set-off for payments previously made.

"The owner agrees :—

"A. *That the hirer may terminate the hiring by delivering up to the owner the said instrument.*

"B. If the hirer shall punctually pay the full sum of £18 18*s.* by 10*s.* 6*d.* at date of signing, and by 36 monthly instalments of 10*s.* 6*d.* in advance as aforesaid, the said instrument shall become the sole and absolute property of the hirer.

"C. Unless and until the full sum of £18 18*s.* be paid, the said instrument shall be and continue to be the sole property of the owner."

The hirer received the piano under the agreement, paid a few instalments and pledged it with a pawnbroker as security for an advance. In an action brought by the owner to recover possession of the piano from the pawnbroker, it was held by the House of Lords, that upon the true construction of the agreement the hirer was under no legal obligation to buy, but had an option to return the piano or to become its owner by payment in full; that by putting it out of his power to return the piano he had not become bound to buy; that he had therefore not "agreed to buy goods" within the meaning of the *Factors Act*, 1889, sect. 9, and that the owner was entitled to recover the piano from the pawnbroker. The case was distinguished from *Lee* v. *Butler*. Lord Herschell, L.C., in the course of his judgment said:—

"My Lords, it is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement. If Brewster agreed to buy the piano, the parties cannot by calling it a hiring, or by any mere juggling with words, escape from the consequences of the contract into which they entered. What, then, was the real nature of the transaction? The answer to this question is not, I think, involved in any difficulty. Brewster was to

obtain possession of the piano, and to be entitled to its use so long as he paid the plaintiff the stipulated sum of 10*s.* 6*d.* a month, and he was bound to make these monthly payments so long as he retained possession of the piano. If he continued to make them at the appointed times for the period of three years, the piano was to become his property, but he might at any time return it, and, upon doing so, would no longer be liable to make any further payment beyond the monthly sum then due.

"My Lords, I cannot, with all respect, concur in the view of the Court of Appeal, that upon the true construction of the agreement Brewster had 'agreed to buy' the piano. An agreement to buy imports a legal obligation to buy. If there was no such legal obligation, there cannot, in my opinion, properly be said to have been an agreement to buy. Where is any such legal obligation to be found? Brewster might buy or not just as he pleased. He did not agree to make thirty-six or any number of monthly payments. All that he undertook was to make the monthly payment of 10*s.* 6*d.* so long as he kept the piano. He had an option no doubt to buy it by continuing the stipulated payments for a sufficient length of time. If he had exercised that option he would have become the purchaser. I cannot see under these circumstances how he can be said either to have bought or agreed to buy the piano. The terms of the contract did not upon its execution bind him to buy, but left him free to do so or not as he pleased, and nothing happened after the contract was made to impose that obligation. . . . I think it very likely that both parties thought it would probably end in a purchase, but this is

far from shewing that it was an agreement to buy. The monthly payments were no doubt somewhat higher than they would have been if the agreement had contained no such provision. One can well conceive cases, however, in which a person who had not made up his mind to continue the payment for three years would nevertheless enter into such an agreement. It might be worth his while to make somewhat larger monthly payments for the use of the piano in order that he might enjoy that option if he chose to exercise it. In such a case how could it be said that he had agreed to buy when he had come under no obligation to buy, but had not even made up his mind to do so? The agreement is, in its terms, just as applicable to such a case as to one where the hirer had resolved to continue the payments for the three years, and it must be construed upon a consideration of the obligations which its terms created, and not upon a mere speculation as to what was contemplated, or what would probably be done under it.

"It was said in the Court of Appeal that there was an agreement by the appellant to sell, and that an agreement to sell connotes an agreement to buy. This is undoubtedly true if the words 'agreement to sell' be used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell, though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sense

that there can be said to have been an agreement to sell in the present case. . . .

"Reliance was placed on the decision in *Lee* v. *Butler*, and it was said that the present case was not, in principle, distinguishable from it. There seems to me to be the broadest distinction between the two cases. There was there an agreement to buy. The purchase-money was to be paid in two instalments, but as soon as the agreement was entered into there was an absolute obligation to pay both of them, which might have been enforced by action. The person who obtained the goods could not insist upon returning them and so absolve himself from any obligation to make further payment. Unless there was a breach of contract by the party who engaged to make the payments, the transaction necessarily resulted in a sale. That there was in that case an agreement to buy, appears to me, as it did to the Court of Appeal, to be beyond question. . . ."

It will be seen that in the form of hire-purchase agreement (*h*) given above, *clause* 4, runs thus:—

"*The hirer may put an end to the hiring by returning the said chattels at his own cost to the owners.*"

It is essential that a clause of this nature should be inserted in hire-purchase agreements to protect the owner against fraudulent dealing on the part of the hirer (*i*).

(*h*) *Ante*, p. 13.
(*i*) See also *Wylde* v. *Legge*, 84 L. T. 121; *Payne* v. *Wilson*, [1895] 2 Q. B. 537; *post*, p. 186.

Dealers in cycles and goods of a description which rapidly depreciate in value often prefer to run the risk of third persons acquiring a good title to the goods under these Acts, than run the risk of having the goods returned to them in a worn-out condition under a clause such as the above.

The following is a suggested form for an agreement in which the hirer has no option to return the goods:—

An *Agreement* made the day of 191 , *Between* of (hereinafter called the owner) of the one part and of (hereinafter called the hirer) of the other part:

Whereby it is agreed as follows:—

1. That the owner shall let on hire and the hirer shall take a bicycle model height of frame inches gear tyres as shown in the owner's current trade catalogue at the price of £ :

2. The owner hereby acknowledges the receipt of the sum of £ , the first instalment and the hirer hereby agrees to pay the balance of the sum of £ by monthly instalments of £ each to the owner at the owner's address without previous demand on the day of every succeeding calendar month:

3. The hirer shall keep the said bicycle in good and substantial order (damage by fire included) in his own custody at his address as given in this agreement and shall not sell remove or part with the possession of the same without the previous consent in writing of the owner:

4. If the monthly instalments shall be duly paid by the hirer in manner hereinbefore provided the said bicycle shall become the property of the hirer but until such payments shall have been made in full the same shall remain the property of the owner:

5. If the owner shall grant to the hirer any time or indulgence the same shall not affect or prejudice the owner's rights under this agreement.

It will be noticed that the above form contains no clause enabling the hirer to determine the hiring by returning the cycle to the owner. The hirer under this agreement is bound to purchase the cycle by the payment of the agreed number of instalments. Thus it clearly comes within the decision in the case of *Lee* v. *Butler* (*k*), and any *bonâ fide* purchaser or pledgee would obtain a good title to the bicycle under sect. 9 of the *Factors Act*, 1889 (*l*) and sect. 25 of the *Sale of Goods Act*, 1893 (*m*).

The following is a simple form of hire-purchase agreement, in actual use, which is clearly within the meaning of the Acts:—

To Messrs. . Date .

Please supply me, Carriage Paid, at your risk, One Billiard Table, size , for which I enclose shillings pence, being amount of first instalment, and I agree to pay 12 further *Monthly Instalments* of

(*k*) [1893] 2 Q. B. 318.
(*l*) 52 & 53 Vict. c. 45.
(*m*) 56 & 57 Vict. c. 71.

shillings, and pence per month. I also agree not to dispose of the said Billiard Table and Accessories until *all* instalments are paid, when the Table becomes my absolute property.

Signature

Address

CHAPTER V.

THE BANKRUPTCY ACT, 1883.

On the bankruptcy of a hirer of goods, claims are frequently made under the *reputed ownership clause* of the *Bankruptcy Act* 1883 (*a*), to hold on behalf of the creditor goods hired by the bankrupt and in his possession at the time of his bankruptcy.

It is provided by *section* 44, that the property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall comprise, amongst other particulars, of:—

(*Sub-section* (*iii*).) "*All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is reputed owner thereof . . .* "

In order that the goods should pass to the trustee under this sub-section it is necessary that at the commencement (*b*) of the bankruptcy:—

(*a*) 46 & 47 Vict. c. 52, s. 44, sub-s. (iii.).
(*b*) See Williams' Bankruptcy Practice, 9th ed., pp. 189, 237; *Lyon* v. *Weldon*, 2 Bing. 334.

(i.) The goods should be in the possession, order, or disposition of the bankrupt *in his trade or business* :—

(ii.) The bankrupt must be the reputed owner; and

(iii.) The true owner must consent to the possession, order, or disposition.

Each of these propositions is a matter of fact to be determined by the particular circumstances of each case (*c*).

The word "goods" includes all personal chattels (*d*). The goods must be in the *sole* possession and *sole* reputed ownership of the bankrupt, and where two partners, one of whom was an infant, committed an act of bankruptcy, and the adult partner was adjudicated bankrupt, it was held that the goods which were in the joint possession of the two partners as reputed owners did not pass to the trustee in bankruptcy (*e*).

The question of whether or not a bankrupt is the reputed owner of particular goods is a question of fact, and the answer must depend upon the circumstances of the case.

"*In our opinion it is essential before a court can hold that one man's goods are to be taken to pay*

(*c*) *Load* v. *Green*, 15 L. J. Ex. 313.
(*d*) *Horn* v. *Baker*, 2 Sm. L. C. 228.
(*e*) *Ex parte Dorman, Re Lake*, L. R. 8 Ch. App. 51, followed in *Re Bainbridge, Ex parte Fletcher*, 8 Ch. D. 218.

another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such manner and under such circumstances that the reputation of ownership must arise. We think that the cases of Load v. *Green* (*f*) *and Smith* v. *Hudson* (*g*) *fully establish this proposition*" (*h*).

The mere fact of possession of goods by a bankrupt, even though they were originally his property, will not by any rigid rule of law make him the reputed owner thereof. He must be in possession under circumstances which make a reputation of ownership (*i*). Continuance of possession where the bankrupt was the original owner of the goods is strong *primâ facie* evidence that he is the reputed owner (*k*). It must be shown that the goods were left in the possession of the bankrupt under circumstances that he could obtain credit upon them (*l*). The goods must be in the *actual* possession of the bankrupt, where :—

A bankrupt being indebted to a friend, and having no property but her furniture, transferred the furniture in

(*f*) 15 L. J. Ex. 313 ; see also *Prisinall* v. *Lovegrove*, 6 L. T. 229.
(*g*) 34 L. J. Q. B. 145.
(*h*) *In re Watson & Co., Ex parte Atkins Bros.*, [1904] 2 K. B. 753, p. 756.
(*i*) *Ex parte Watkins*, L. R. 8 Ch. App. 520.
(*k*) *Lingard* v. *Messiter*, 1 B. & C. 308 ; *Ex parte Lovering, Re Jones*, L. R. 9 Ch. App. 621.
(*l*) *Colonial Bank* v. *Whinney*, 11 App. Cas. 426; *Ex parte Dover*, 2 M. D. & De G. 259.

satisfaction of the loan, and carried out the transaction by documents which were found in fact to be an absolute Bill of Sale. Subsequently the sheriff seized the goods in execution, and was actually in possession when the bankrupt filed her own petition. The trustee in bankruptcy claimed the furniture, and sought to set aside the Bill of Sale as void for want of registration. It was held that the Bill of Sale could not be avoided, because at the date when the bankrupt filed her petition the goods were not in her possession or apparent possession, but in the possession of the sheriff (*m*).

Goods which are properly in the possession of the sheriff are taken out of the possession of the bankrupt (*n*).

A well-known custom of trade to leave the goods of one person in the possession of another will exclude the reputation of ownership (*o*). The custom must be a reasonable one (*p*), and the onus of proof lies upon those who allege its existence (*q*). Questions of custom should be decided from evidence (*r*). The court will, however, take judicial notice of a custom which has been proved in a previous case (*a*).

(*m*) *In re Eales, Ex parte Steel*, 54 W. R. 202, following *Re Brenner, Ex parte Saffery*, 16 Ch. D. 668.
(*n*) *Fletcher* v. *Manning*, 12 M. & W. 571.
(*o*) *Ex parte Watkins*, 8 L. R. Ch. App. 520.
(*p*) *Moult* v. *Halliday*, [1898] 1 Q. B. 125.
(*q*) *Ex parte Nassan, Re Horn*, 3 Morrell, 51 ; see also *Re Hill*, 1 Ch. D. 503, n. (10).
(*r*) *Ex parte Reynolds, Re Barnett*, 15 Q. B. D. 169.
(*a*) *Ex parte Powell*, 1 Ch. D. 501.

A general custom to let goods on hire has been held to be proved with regard to furniture in a hotel :—

Where the plaintiff lent furniture on the hire-purchase system to the defendants, who were hotel-keepers, with the provision that until all instalments were paid the property should remain in the plaintiff. And the defendants later became bankrupt. It was held that the trustee in bankruptcy was entitled to all the personal effects of the bankrupts, *but not to the hired furniture.* And that the custom of hotel-keepers holding their furniture on hire is now so well established that it ought to be taken judicial notice of (*b*).

A general custom to hire goods has been held to exist in the following cases :—

(1) The hiring of machinery in the printing trade (*c*).
(2) The hiring of a portable steam engine by a timber merchant (*d*).
(3) The hire of gas engines (*e*).
(4) The hire of furniture by boarding-house keepers (*f*).
(5) Ironmongers dealing in safes (*g*).

(*b*) *Crawcour* v. *Salter*, 18 Ch. D. 30; see also *Ex parte Turquand, Re Parker & Co.*, 14 Q. B. D. 636.
(*c*) *Ex parte Hughes*, 5 Morrell, 235.
(*d*) *Ex parte Stooke*, 20 W. R. 925.
(*e*) *Ex parte Crossley, Re Peel*, [1895] A. C. 457
(*f*) *Re Chapman, Ex parte Whiteley*, 1 Manson, 415.
(*g*) *Re Lock, Ex parte Poppleton*, 8 Morrell, 51.

It has, however, been stated that the fact that it is the custom of furniture dealers to let out furniture on hire does not disentitle the general public to assume that an ordinary householder is the true owner of the furniture which is in his house :—

Where the furniture of a trader having been seized under an execution, a friend of his bought it from the sheriff at a valuation, and then verbally agreed that the debtor should continue in possession of it and use it as before, paying, by way of rent, interest at 5 per cent. per annum on the purchase-money, until he should be able to repurchase it at the price given for it. This arrangement was carried out, and the debtor remained in possession of the furniture as before, until he filed a liquidation petition. He had not repurchased it. The trustee in liquidation claimed it under the reputed ownership clause. It was admitted that there is a custom for furniture dealers to let out furniture on a three years' hiring and purchase agreement, but there was no other evidence as to the existence of any custom of hiring furniture. *Held*, that the trustee was entitled to the furniture (*h*).

Again :—

Where a draper in London, being the owner of household furniture which was in his dwelling-house and shop, signed a written agreement by which he sold the furniture to a furniture dealer and hired it back at a rental of 12*s.* 6*d.* a week. He remained in use and occupation of the furniture under the agreement for more than four years,

(*h*) *Ex parte Brooks*, 23 Ch. D. 261.

and then filed a petition for liquidation, under which a trustee was appointed. *Held*, that the furniture was in the order and disposition of the debtor as the reputed owner at the commencement of the liquidation, and the trustee was entitled to it (*i*).

It must be noticed that the above two cases were decided under sect. 15, sub-sect. (5) of the *Bankruptcy Act*, 1869 (*k*), which sub-section corresponds to sub-sect. (iii.) of sect. 44 of the *Bankruptcy Act*, 1883 (*l*). The sub-sections differ in that the words "*in his trade or business*" are substituted for those of "*being a trader*" contained in the earlier Act.

The Court of Appeal held in the case of *Colonial Bank* v. *Whinney*, that the words "*in his trade or business*" meant that the goods must be in the bankrupt's order and disposition "for the purposes of or purposes connected with his trade or business" and "not merely visibly employed in his trade or business, but acquired for the purposes of the business and used for these purposes" (*m*).

The decision was reversed in the House of Lords (*n*), but upon grounds which do not affect the meaning put upon these words in the Court of Appeal.

(*i*) *Ex parte Lovering, Re Jones*, L. R. 9 Ch. App. 621.
(*k*) 32 & 33 Vict. c. 71.
(*l*) 46 & 47 Vict. c. 52.
(*m*) 30 Ch. D. 261 at pp. 274, 281; see Williams, Bankruptcy Practice, 9th ed., p. 232.
(*n*) 11 App. Cas. 426.

The business must be carried on with a view to profit as a means of livelihood in order for the section to apply, and it is not sufficient that a profit is made if the primary object was pleasure (*o*).

In the case of *In re Jenkinson, Ex parte The Nottingham and Nottinghamshire Bank* (*p*) where :—

J., who carried on business as a stockbroker, silversmith, and watchmaker, deposited with his bankers the certificates of thirty shares in a joint-stock company as security for the balance of his overdrawn account. There was no formal transfer of the shares. The company had notice of the deposit on January 31, 1884. On February 2 a petition in bankruptcy was filed against J., and a receiving order made, and he was subsequently adjudged bankrupt. *Held*, that the shares were not at the commencement of the bankruptcy "in the possession, order, or disposition of the bankrupt *in his trade or business*," within sect. 44 of the Bankruptcy Act, 1883.

Cave, J., remarked in the course of his judgment in the above case that :—

"The expressions goods 'in the possession of a bankrupt being a trader,' and goods 'in the possession of a bankrupt in his trade or business' can hardly be regarded as identical. If a wine merchant carrying on business in the City, lives say at Surbiton, the furniture in his house at Surbiton may be said to be in his possession,

(*o*) *Re Wallis, Ex parte Sully*, 14 Q. B. D. 950.
(*p*) 15 Q. B. D. 441.

being a trader, but it cannot be said, we think, that it is in his possession in his trade or business. So, if a silk mercer in St. Paul's Churchyard were to keep a yacht for his amusement, it could hardly be said that it was in his possession in his trade as a silk merchant."

It is clear that hired goods or furniture cannot pass to the trustee in bankruptcy under the reputed ownership clause, if the bankrupt does not carry on a trade or business, or even if he does so unless the goods are in his possession, order, or disposition for the purpose of his trade or business (*q*).

The custom to hire a sewing-machine on the hire system has been recognised (*r*) and also that of a piano :—

Where four months previously to his bankruptcy, the debtor hired a piano from H. & Co., upon the following written terms:—£15 a year for three years by equal monthly instalments of 25*s.*; at the expiration of which term the piano became the absolute property of the hirer; but in case the instalments were not paid, or in the event of death, bankruptcy, or insolvency of the hirer before the expiration of the term, H. & Co. were to be at liberty to determine the hiring and take possession of the instrument. There was no special mark on the

(*q*) See also *Re Harrison, Ex parte Official Receiver*, 10 Morrell, 1 ; *Re Watson & Co., Ex parte Atkins Bros.*, [1904] 2 K. B. 753 ; *Sharman* v. *Mason*, [1899] 2 Q. B. 679.

(*r*) *Ex parte Singer Co.*, 12 Ir. L. T. 57.

instrument to show that it was not the property of the debtor. Upon the bankruptcy, H. & Co. removed the piano from the debtor's premises. The trustee claimed the piano as being within the order and disposition of the debtor. There was evidence of a custom of letting pianos on such terms.

Held, that the custom was sufficiently established, and one which the ordinary creditors of a bankrupt must be reasonably presumed to have known, and accordingly that the agreement was valid, and the trustee had no claim to the piano (*s*).

In order to establish that goods are within the *reputed ownership clause*, it is essential that the true owner should have consented to a state of things necessarily leading to the inference of ownership by the bankrupt, and in determining the consent of the true owner the real relation of the parties must be taken into consideration (*t*). The onus of proving that the true owner has consented lies upon the trustee in bankruptcy (*u*). Where before the commencement of a bankruptcy the owner of the goods in the possession or under the control of the bankrupt demands the goods *bonâ fide* with the object of obtaining delivery of them, his consent to them remaining in or under the

(*s*) *Ex parte Hattersley*, 8 Ch. D. 601, decided under the Act of 1869.

(*t*) *In re Watson & Co., Ex parte Atkins Bros.*, [1904] 2 K. B. 753.

(*u*) *Re Eslick, Ex parte Phillips*, 4 Ch. D. 496.

control or possession of the bankrupt is determined by the demand (*x*). If the goods are in the bankrupt's possession at the commencement of the bankruptcy, and the owner, not having notice of an act of bankruptcy, can obtain possession before the receiving order, his title will displace that of the trustee in bankruptcy (*y*).

(*x*) *Ex parte Ward*, *In re Couston*, L. R. 8 Ch. App. 144.
(*y*) *Graham* v. *Furber*, 14 C. B. 410; *Smith* v. *Topping*, 5 B. & Ad. 674.

CHAPTER VI.

THE LAW RELATING TO FIXTURES.

The law relating to fixtures has an important bearing on the position of the owner in regard to machinery and goods which require fixing to the hirer's premises.

Fixtures are such movable articles as are fixed to the ground or soil, either directly or indirectly, by being attached to a house or other building (*a*). At Common Law the land was regarded as of far greater importance than any chattel which could be fixed to it, and as a result it followed that all things attached to the land were considered as part of the land itself. Houses, being made up of chattels personal (bricks, tiles, slates, timber, etc.) fixed to the land, are conveyed from one person to another with the land without express mention in the deed of conveyance (*b*). When a house or building is conveyed, whether absolutely or by way of mortgage, all ordinary fixtures, such as stoves,

(*a*) Williams on Personal Property, 16th ed., p. 131.
(*b*) Williams' Real Property, 20th ed., p. 34.

grates, shelves, locks, cupboards, etc. (*c*), and also fixtures erected for the purpose of trade (*d*), pass with the house without any express mention in the conveyance.

Where a gas engine was let out on the hire-purchase system under an agreement in writing, which provided that it should not become the property of the hirer until the payments of the instalments, and should be removable by the owner on the failure of the hirer to pay any instalment. The engine was affixed to the freehold of the hirer by bolts and screws to prevent it from rocking, and was used by him for the purposes of his trade. Default having been made in the payment of the instalments, the engine was claimed by the owner, and also by a mortgagee of the land, who took his mortgage after the hiring agreement and without notice of it, and had entered into possession while the engine was still on the land.

Held, that the engine was sufficiently annexed to the land to become a fixture; and that any intention to be inferred from the terms of the hiring agreement that the engine should remain a chattel did not prevent it from becoming a fixture, and consequently that it passed to the mortgagee as part of the freehold (*e*).

It was argued for the owner, in the above case, that he had a right under the hiring agreement to remove the engine on the non-payment of the

(*c*) *Ex parte Barclay and others*, 5 De G., M. & G. 403.
(*d*) *Holland* v. *Hodgson*, L. R. 7 C. P. 328.
(*e*) *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; see also *Allen*, *In re*, [1907] 1 Ch. 575.

instalments; but it was decided that this right could not be exercised against the mortgagee and that, even if a licence to remove the engine could be implied from the mortgagee leaving the mortgagor in possession, the entry of the mortgagee into possession determined the licence (*f*). This was followed in the case of *Ellis* v. *Glover & Hobson, Ltd.* (*g*), in which case—

In November, 1902, a freehold laundry was mortgaged in the usual form for £400, the mortgagor covenanting not to remove any fixtures without the written consent of the mortgagee. In June, 1903, trade machinery was fixed up in the premises under a hire-purchase agreement, which provided that it should not become the property of the hirer until all instalments had been paid, and should be removable by the owner on the failure of the hirer to pay any instalment. Default having been made in the payment of an instalment, the owner entered and removed the machinery. In an action by the mortgagee against the owner for wrongful removal :—

Held, that the machinery passed to the mortgagee as part of the freehold, and that in the absence of express stipulation to the contrary, a mortgagor in possession has the right to permit trade fixtures to be put up and removed from the mortgaged premises provided they are removed before the mortgagee takes possession, but

(*f*) See also *Gough* v. *Wood & Co.*, [1894] 1 Q. B. 713; *Climie* v. *Wood*, 4 Exch. 328; *Holland* v. *Hodgson*, L. R. 7 C. P. 328.
(*g*) [1908] 1 K. B. 388.

this right of removal ceases when possession is taken by the mortgagee. (*Ellis* v. *Glover & Hobson, Ltd.*)

Fixtures attached to premises subsequently to a mortgage thereof, become part of the premises and subject to the mortgagee's security (*h*).

Where machines were supplied by the owner of them to the lessee of a factory upon the hire-purchase system, and they were affixed, as the owner knew, to concrete beds in the floor of the factory by bolts and nuts, and could not have been removed without injury to the building or the beds. The lessee made default in payment of the instalments under the hiring agreement, and the owner brought an action to recover the machines or their value from a mortgagee of the premises who had taken possession. It was held that the machines had been so affixed as to pass by the mortgage to the mortgagee (*i*).

The question whether a chattel when annexed becomes a fixture, or retains its original character, is one of fact to be gathered from all the circumstances of each particular case.

In a recent case—

Where chairs were hired from the plaintiffs for use in a hippodrome by the owner and occupier of the building under an agreement for hire containing an option of purchase which was never exercised. The chairs were fastened to the floor of the building by means of screws,

(*h*) *Monti* v. *Barnes*, [1901] 1 K. B. 205.
(*i*) *Reynolds* v. *Ashby*, [1904] A. C. 466.

in accordance with the requirements of the local authority. It was held that the chairs did not cease to be chattels because they were screwed down to the floor, and that the property in them did not pass as against the plaintiffs to the mortgagee of the freehold under a mortgage of the building and fixtures (*k*).

Again—

Where a gas engine was let out by the plaintiffs on hire under an agreement in writing which provided for monthly payments, and that the engine should remain the property of the plaintiffs until the hirer had exercised the option of purchase given by the agreement, and should be removable by the plaintiffs on the failure of the hirer to pay any instalment. The engine was affixed to the floor of the premises, of which the hirer was the defendant's tenant, by bolts and screws, and was used by the hirer for the purposes of his trade. The engine was seized by the defendant under a distress for rent due from the hirer and sold :—

Held, that the engine had become a fixture, and was therefore not distrainable. (*Crossley Bros., Ltd.* v. *Lee* (*l*).)

Where part of a machine is a fixture, and another essential part of it is movable, the latter movable part is a fixture also (*m*).

(*k*) *Lyon & Co.* v. *London City and Midland Bank*, [1903] 2 K. B. 135.

(*l*) [1908] 1 K. B. 86, following *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, and *Reynolds* v. *Ashby*, [1904] 1 K. B. 87 ; see also *Provincial Bill Posting Co.* v. *Low Moor Iron Co.*, [1909] 2 K. B. 344.

(*m*) *Mather* v. *Fraser*, 2 K. & J. 536.

When engines or machinery are let out, on the hire-purchase system, which cannot be worked without being fixed to the premises, clauses such as the following should be inserted in the agreement:—

It is hereby declared that the owners have entered into this agreement upon the express declaration by the hirer, and the hirer hereby expressly warrants that the premises upon which the said engine is to be placed are free from any mortgage, incumbrance, or charge given or created by the hirer or any person through whom he claims.

If the hirer at any time during the hiring shall be desirous of executing or creating any mortgage, incumbrance, or charge of or upon the premises in or upon which the said engine shall for the time being be, he shall give to the owners one calendar month's previous notice in writing of his intention so to do, and upon the receipt of any such notice it shall be lawful for the owners to put an end to the hiring in manner herein provided.

The former of these clauses protects the owners from the machinery or engine becoming affixed without their knowledge to premises on which there is an existing mortgage, whilst the latter enables them to determine the hiring and to remove the goods in case of the hirer mortgaging the premises in the future.

Where engines or machinery are capable of being worked without being affixed and there is a possibility of their being fixed, a clause should be inserted binding the hirer during the hiring in no way to annex the goods to the premises.

CHAPTER VII.

THE RIGHTS AND LIABILITIES OF THE PARTIES.

Between each other. — The rights and liabilities of the parties to a hire-purchase agreement, are governed by the Common Law relating to this class of bailment (*locatio conductio rei*) and the special terms of the contract. It is obvious that most of the terms in a hire-purchase agreement are to protect the interests of the owner of the goods lent. This protection is necessary owing to the fact that the hirer obtains power over goods of much greater value than his deposit or early instalments warrant.

Obligations of the Owner.—Apart from any express terms in the agreement the owner of goods let out on hire is bound to see that those goods are reasonably fit and suitable for the purpose for which they are intended. Delivery of the goods to the hirer amounts to an implied warranty that the goods are in fact as fit and suitable for

their purpose as reasonable care and skill can make them (*a*). Where—

The defendant supplied sacks on hire to the plaintiffs for the purpose of being used in unloading a cargo of peas from a ship. And one of the sacks, while it was being hoisted full of peas from the hold of the ship, broke and fell and injured a man who was engaged in the work. The injured man recovered from the plaintiffs £25, damages and costs. The sack in question when supplied to the defendant was unfit for the purpose for which it was supplied :—

Held, that the plaintiffs were entitled to recover, as damages for breach of warranty, the damages and costs which they had incurred (*b*).

This implied warranty of fitness should be compared with the one in cases of sale contained in the *Sale of Goods Act*, 1893 (*c*), sect. 14, subsect. (1), which reads as follows :—

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill and judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or

(*a*) *Sutton* v. *Temple*, 12 M. & W. 52 ; *McCarthy* v. *Young*, 6 H. & N. 329 ; *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145.

(*b*) *Vogan & Co.* v. *Oulton*, 81 L. T. 435 ; see also *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640 ; and *The Moorcock*, 14 P. D. 64.

(*c*) 56 & 57 Vict. c. 71.

not), there is an implied condition that the goods shall be reasonably fit for such purpose . . ." (*d*).

This implied warranty of fitness does not extend to cases where the immediate cause of the damage is a hidden defect in the chattel let out on hire which no amount of care on the part of the owner could have discovered (*e*).

Similar to the implied condition on the part of a seller of goods, that the buyer shall have and enjoy quiet possession of the goods in question (*f*), so there is an implied condition in a hiring agreement that the owner will put the hirer in peaceable possession of the goods hired, and permit them to remain in the hirer's custody subject to the agreed period of hire and the other terms of the contract.

Obligations of the Hirer.—Apart from the terms of the agreement the hirer is under an obligation to take reasonable care of the goods hired (*g*). He is not liable for ordinary and reasonable wear and tear, nor is he liable for loss or injury unless caused by his negligence, or that of his servants (*h*). It has been held that a bailee is not liable for injury

(*d*) *Jones* v. *Bright*, 5 Bing. 533; *Jones* v. *Just*, L. R. 3 Q. B. 197; *Randall* v. *Newson*, 2 Q. B. D. 102.
(*e*) *Readhead* v. *Midland Rail. Co.*, L. R. 2 Q. B. 412.
(*f*) Chalmers, Sale of Goods Act, 1893, at p. 30.
(*g*) *Coupé Co.* v. *Maddock*, [1891] 2 Q. B. 413; *Sanderson* v. *Collins*, [1904] 1 K. B. 628.
(*h*) *Blakemore* v. *Bristol and Exeter Rail. Co.*, 8 E. & B. 1035.

to the subject-matter of the bailment when such injury is the immediate consequence of an act of his servant not in the course of his employment (*i*).

The hirer's liability may be extended by the terms of the agreement, but when so extended the terms will be construed with reference to the condition of the goods at the time of the hiring.

Where A. contracted to hire a barge of B., the contract containing a stipulation that "fair wear and tear were to be allowed by the owner" and when delivered up, the barge was "to be in good working order, with all her rigging, gear, and implements complete." It was held a misdirection to tell the jury that this absolute engagement on the part of the hirer to deliver up the barge (which was proved to be an old one at the time of hiring) in "good working order" without reference to her condition at the commencement of the hiring (*k*).

The hirer must return the goods according to the terms of the agreement. But if the goods have perished through no fault of the hirer the impossibility of return excuses him. He is not liable for loss by *accidental* fire, and if a bailee has not been guilty of any negligence and the goods are stolen he is not responsible for their loss (*l*). It is usual

(*i*) *Sanderson* v. *Collins*, above; *Cheshire* v. *Bailey*, [1905] 1 K. B. 237.

(*k*) *Shroder* v. *Ward*, 13 C. B. N. S. 410.

(*l*) *Taylor* v. *Caldwell*, 3 B. & S. 826; *Gowan* v. *Christie*, L. R. 2 H. L. Sc. 273; *Grimsdick* v. *Sweetman*, [1909] 2 K. B. 740, at p. 744.

in hire-purchase agreements to make the hirer liable for loss and damage by fire.

The hirer shall:—Keep the said chattels in good and substantial order (*damage by fire included*) . . . (*m*).

According to the terms of the agreement the hirer must—

"*Pay for the hire to the owner so long as the hirer thinks fit to continue the hire* (the hirer under clause 4 (*n*) has a right apart from these words to end the hiring by returning the goods to the owner) *without previous demand the sum of £ per quarter.*"

The word "*quarter*" in this clause is qualified by the later use of the phrase "*three calendar months,*" which clearly indicates payment every three calendar months. "Quarterly," without some qualification, would mean four payments a year on the usual quarter days. The word "month" in a hire-purchase agreement means *primâ facie* a lunar month (*o*). This reading of "month" in commercial documents is in contrast with the definition

(*m*) Clause 2 (b) Form, at p. 12.
(*n*) Clause 4, at p. 13.
(*o*) *Hutton* v. *Brown*, 29 W. R. 928; *Bruner* v. *Moore*, [1904] 1 Ch. 305.

of the word "month" given in sect. 3 of the *Interpretation Act*, 1889 (*p*)—the section provides that in every *Act* passed after the year 1850 whether before or after the commencement of this Act the expression "month" shall mean calendar month.

The hirer may be made liable to pay the instalments at any period agreed upon, and monthly payments are often arranged for, in which case the following clause should be used :—

So long as the hirer thinks fit to continue the hiring he shall pay to the owner without demand the sum of £ on the day of every *calendar* month for the hire of the said furniture, the first of such payments to be made on the day of next.

If the hirer makes default in the payment of any instalment the owner may resume possession of the goods, and this right he can exercise (*q*). Equity will not relieve the hirer against a forfeiture occasioned by default in the punctual payments of instalments (*r*). Nor will the subsequent tender of the instalments in arrear displace the owner's right to resume possession of the goods, and the hirer has no equitable claim either to the goods, or to recover any of the past-paid instalments. Where—

(*p*) 52 & 53 Vict. c. 63, s. 3.
(*q*) *Ex parte Sergeant, Re Gelder*, [1881] W. N. 37 ; *Leman* v. *York Rail. Waggon Co.*, 50 L. J. Ch. 293.
(*r*) *Cramer* v. *Giles*, 1 Cab. & El. 151 ; *Sterne* v. *Beck*, 1 De G. J. & Sm. 595.

A piano was let on the three years' hire system, under an agreement providing that—"*In case of default in the punctual payment of any instalment, the instalments previously paid shall be forfeited to J. B. C., who shall thereupon be entitled to resume possession of the instrument.*" It was held, upon default, that J. B. C. was entitled to possession of the piano, although the instalments in arrear were tendered to the hirer before the action was brought (*s*).

It should be noticed that the hirer under the terms of the agreement usually stipulates not to part with the possession of the goods, not to sell or remove them, to allow all properly authorised persons to inspect them at all reasonable times, and to pay the rent, rates, and taxes in respect of the premises in which the goods are for the time being (*t*). The owner is entitled to resume possession of the goods on the hirer in any way breaking these terms or suffering any of the disabilities (*u*) set out in the agreement.

A hire-purchase agreement should always contain a clause enabling the owner to sue for arrears of rent after he has seized the goods. In the absence of such a clause the owner may not be able to recover arrears of hire after he has resumed possession on default of the hirer :—

(*s*) *Cramer* v. *Giles*, 1 Cab. & El. 151.
(*t*) See clause 2, p. 12.
(*u*) See clause 3, p. 13.

If the hiring is determined by the owner or by the hirer in manner herein provided all hire (and damages for breach of agreement) up to the date of such determination shall be paid by the hirer to the owner and no credit or allowance in respect of payments previously made shall be made or allowed to the hirer (*x*).

The case of *Hewison* v. *Ricketts* (*y*) is quoted as the authority for the statement that an owner cannot recover arrears of rent after he has seized the goods, but this case must now be read in conjunction with the case of *Brooks* v. *Beirnstein* (*z*) considered later.

In *Hewison* v. *Ricketts*—

> The plaintiffs as "owners" of omnibuses and horses contracted to let them to G. the hirer under the following agreement:—

Memorandum of *Agreement* made and entered into the third day of December, 1892, between Peter Frank Hewison and George Etherington Peacock, of, etc. . . . omnibus proprietors, hereinafter called "the owners," of the one part, and George Guiern . . ., hereinafter called "the hirer," of the other part, whereby it was agreed between the parties hereto as follows:

The owner will let and the hirer will hire two omnibuses, etc. . . . hereinafter called "the chattels," particularly set forth and described in the schedule hereto:

(*x*) Clause 6, p. 13.
(*y*) 71 L. T. 191.
(*z*) [1909] 1 K. B. 98.

The said goods and chattels are admitted by the hirer to be of the value of £368, and the same are to be let and hired at a monthly hiring upon the terms and conditions hereinafter mentioned; the hire is a payment of £125, in advance on or before the signing of this agreement, and the sum of £243, by twenty monthly payments of £12 each, and one monthly payment of £3.

The first and all future payments are to be made by the hirer at the office of the owners on the first day of every month, or within twenty-one days thereafter, commencing with the first day of January, 1893.

The hirer shall keep the rent and taxes to accrue due in respect of the premises in or upon which the said chattels for the time being are placed regularly and punctually paid, and shall upon the request of the owners produce to them or their representatives the receipt for such rent, rates, and taxes, and shall not assign or in any way part with the possession of the said chattels.

The hirer shall not during the continuance of this agreement, and without the consent in writing of the owners, remove the said chattels or any part thereof, or permit the same to be removed from or off the premises at which the same shall have been delivered except in the usual course of business.

The owners and every person appointed by them shall and may at any convenient time enter into or upon any premises in or upon which the said chattels may or be supposed to be, for the purpose of viewing the state or condition thereof.

As to the said chattels, the hirer shall not injure the

same or permit the same to be injured, and will keep the same unhurt but in the same state as they now are (reasonable wear and tear excepted), and will to the satisfaction of the owners replace any of the chattels other than the said horses, which may have to be destroyed by disease, and as to the said horses the hirer shall keep well fed, and bestow all due and reasonable proper care and attention upon them.

In case of any breach of this agreement or any of the conditions thereof on the part of the said hirer, or in case the rent or any instalment thereof shall not be paid on the days hereinbefore appointed for payment thereof, or within twenty-one days thereafter, or in case the said hirer shall become bankrupt or make any arrangement with his creditors, or allow any judgment to remain unsatisfied against him, it shall be lawful for the owners to seize the said chattels at any time or in any place, and to enter the said premises for the purpose of such seizure and remove the said chattels. And this agreement may be pleaded as conclusive evidence of the leave and licence of the said hirer to the said owners and all persons acting therein by that order for the entry or trespass, and in case of damage, loss, or injury being done or caused to the said chattels, the said hirer shall make the same good.

In case of determination and in all other cases any money paid under this agreement shall belong absolutely to the owners. If this agreement shall not be determined before the expiration of the period of hiring, then upon the expiration thereof, and upon the full payment of all moneys due for hire, and not before or otherwise, the things hired shall become the absolute property of the hirer.

The hirer obtained possession of the chattels under the agreement. Default was made in payment of an instalment and the owners seized the chattels. In consideration of the chattels being returned to the hirer, the defendant paid the amount due and became guarantor (*a*) of the remaining instalments to accrue due. Upon two more instalments becoming in arrear the plaintiffs again seized and resumed the possession of the chattels. The owners then sued the defendant (the guarantor) for the amount of the two unpaid instalments, and recovered judgment. On appeal by the guarantor from the judgment recovered against him in the County Court, it was held that the hire and purchase agreement was primarily a sale and purchase agreement, and was determined by the plaintiffs (owners) resuming possession of the chattels. By so doing they lost their right to sue G. (the hirer), and therefore could not recover the unpaid instalments from the defendant (the guarantor). They could not resume possession and still recover unpaid instalments from the surety. (*Hewison* v. *Ricketts.*)

The above case came up for consideration in the case of *Brooks* v. *Beirnstein* (*b*), where—

(*a*) For form of guarantee used in this case, see p. 110.
(*b*) [1909] 1 K. B. 98.

By an agreement in writing made April 29, 1907, between the London and Provincial Furnishing Co., therein called the owners, and W. M. Brooks, therein called the hirer, it was agreed that "in consideration of the hirer agreeing to pay the owners £1 on signing this agreement, £14 on or before delivery, and the further sum of £20 on or before June 29, 1907, making in all the sum of £35 (as consideration for the option of purchase given) . . . the owners agree to let and the hirer agrees to hire the goods described in the schedule hereto, at the rent of £7 per month on the following terms :—

1. The hirer agrees with the owners as follows :—

(*a*) To pay punctually the said rent monthly, commencing May 29, 1907.

(*e*) That if the hirer does not truly perform and observe this agreement the owners, their servants, and agents, may retake possession of the said furniture and other goods by force or otherwise.

2. The owners agree with the hirer as follows :—

(*a*) The hirer may terminate the hiring by giving the owners one week's notice and at the expiration thereof delivering up to them the said furniture and other goods without prejudice to the owners' right to recover any arrears of rent and damage for any injury to the said furniture and other goods.

(*b*) If this agreement be duly performed by the hirer, the hirer may at any time during the continuance thereof, provided the rent be punctually paid in the manner aforesaid, purchase by a cash payment the said furniture and other goods of the value named in the schedule hereto, in which case credit shall be given for the amount paid for option and rent paid.

3. The parties hereto expressly agree that the hirer shall in no case be entitled to any credit for the said amount paid for option, or for the said rent, or any part thereof, except on purchase of the said furniture and other goods under the provisions of clause 2, par. (*b*), and that the said furniture and other goods shall otherwise remain the property of the owners subject to the provisions of this agreement only."

The hirer paid the £35, the consideration for the option of purchase, and the goods were delivered to him. He paid the monthly rent for some months, but eventually got in arrears and owed the owners £51 15*s.* for rent unpaid. The owners exercised the powers given them by clause 1, par. (*e*), of the agreement and retook possession of the goods. The owners sued for the arrears of rent. It was held that the owner by so retaking possession had not abandoned his right to sue for arrears of rent. (*Brooks* v. *Beirnstein.*)

In the above case the agreement was held to be one of hire, plus an option to purchase, and the hirer having enjoyed the use of the furniture, which was the consideration for the rent, there was no reason why he should not be liable to pay the arrears claimed. *J. Walton* distinguished the case from that of *Hewison* v. *Ricketts* (*c*) on the ground that in that case the contract was one of sale and not of hiring.

Some forms of hire-purchase agreements contain a clause whereby the hirer agrees that the owner

(*c*) 71 L. T. 191.

may, in order to obtain possession of the goods on non-payment of the instalments, break open doors and otherwise effect a forcible entry. Such a clause should not be inserted, for it is contrary to the statute 5 Rich. II., stat. 1, c. 8, which provides:—

"As also the King enjoineth that none from henceforth make entry into any lands and tenements but in case where entry is given by law, and in such case not with strong hand nor with multitude of people, but only in lawful, peaceable, and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body and thereof be ransomed at the King's will" (*d*).

Though the point apparently has never come up for decision, it is submitted that an owner who accepts payment of an instalment after he is entitled to retake possession of the goods through any default of the hirer thereby waives his right as to seizure. The position is much the same as a landlord who receives rent from a tenant, which has become due after a forfeiture. The landlord thereby waives his right of forfeiture (*e*). Where—

Under a hiring agreement in 1889 the defendants, a telephone company, supplied to the plaintiffs the use of a telephone wire and apparatus for three years at a rent payable quarterly. Upon the expiration of the term, the

(*d*) *Edwick* v. *Hawkes*, 18 Ch. D. 199; *Semayne's Case*, 1 Sm. L. C. 104—118.

(*e*) See Foa, Landlord and Tenant, 4th ed., p. 624.

parties continued the agreement by mutual consent. On December 30, 1893, being the last day of a quarter, the defendants gave the plaintiffs a notice determining the agreement forthwith, and stating their intention to disconnect the wire and remove the apparatus, and at the same time they demanded rent "up to the 31st of December," being one day beyond the quarter. This rent was duly paid to and accepted by the defendants. Upon a motion by the plaintiffs for an injunction to restrain the defendants from interfering with the wire and apparatus :—

Held, that the agreement created the relation of landlord and tenant, and therefore that the acceptance by the defendants of rent for a day beyond that on which the notice determining the contract was given operated as a waiver of the notice. Accordingly, an injunction was granted restraining the defendants from acting on this notice (*f*).

Frequently an owner does not press his full rights against a hirer who is in temporary difficulties. It is wise to insert in the agreement a clause, such as the following one, in order to safeguard the owner's strict rights under the agreement :—

If the owner shall grant to the hirer any time or indulgence the same shall not affect the owner's strict rights under the agreement (*g*).

Apart from the owner's right to resume possession of the goods on the hirer's failure to pay an

(*f*) *Keith Prowse & Co.* v. *National Telephone Co.*, [1894] 2 Ch. 147.

(*g*) Clause 7, *ante*, p. 14.

instalment or otherwise failing to observe the terms of the agreement, the owner can always sue, and the hirer is liable for any damage which the owner may sustain by a breach of contract on the part of the hirer.

Any act of the hirer inconsistent with the terms of the contract, express or implied, is a determination of the hiring, and causes the right of possession to the goods to revert to the owner, and entitles him to maintain an action for conversion against the hirer (*h*). If, after a breach of agreement, the hirer refuses to give the goods up on demand, the owner can bring an action against the hirer in detinue (*i*). If the hirer sells or otherwise disposes of the goods, and the agreement is in ordinary form (that is, drawn within *Helby* v. *Matthews* (*k*)), the owner, in addition to his remedy against the hirer, has also a right of action against the transferee for recovery of the goods or damages, or both, according to the circumstances of the case.

An unlawful disposition on the part of the hirer may amount to larceny (*l*).

(*h*) *Post*, p. 167.
(*i*) *Post*, p. 170.
(*k*) [1895] A. C. 471.
(*l*) *Post*, p. 178.

CHAPTER VIII.

ASSIGNMENT.

At Common Law a contract was not assignable without the consent of both contracting parties. But in equity a right was given to the assignee to sue in his own name on the contract (*a*). Now, by the *Judicature Act*, 1873 (*b*), there can be a legal assignment of a contract. Sect. 25, sub-sect. (6), of the Act provides that—

Any absolute *assignment by writing* under the hand of the assignor (not purporting to be by way of charge only) of any debt or other *legal chose in action*, of which *express notice in writing* shall be given to the debtor, trustee, or *other person* from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and shall be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee, if this Act had not been passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.

(*a*) See Chitty on Contracts, 15th ed., p. 829.
(*b*) 36 & 37 Vict. c. 66.

It will be observed that certain conditions are laid down in the above section. The assignment must be in writing, and written notice must be given to the other party to the contract. The assignment must be absolute and not by way of charge. The transfer of rights on an assignment properly executed dates from the date of the written notice to the other party, and not from the date of the assignment.

The owner of goods let out on the hire-purchase system may assign all his interest and rights therein to a third party. The assignee, upon giving notice in writing of the assignment to the hirer, is entitled to receive the instalments from the hirer when they fall due, and the hirer cannot set up the assignment as an excuse for refusing to pay further instalments under the agreement (*c*). In the case of *In re Isaacson, Ex parte Mason* (*d*), where a bankrupt, who was a musical instrument seller, and who had sold a piano upon the hire-purchase system, assigned, by one and the same deed, the piano and also the benefit of the hire-purchase agreement by way of security for money. It was contended on behalf of the trustee in bankruptcy that the assignment was a bill of sale and was void because it was not registered or in the required statutory form,

(*c*) *British Waggon Co.* v. *Lea & Co.*, 5 Q. B. D. 149.
(*d*) [1895] 1 Q. B. 333.

that the hiring agreement was so intimately connected with the piano itself that the assignment of the one could not be separated from the assignment of the other, and that the deed was void *in toto*. It was held that the assignment of the agreement was severable from that of the piano, and that, consequently, the deed was not void *in toto* under the Bills of Sale Acts for non-registration, or because it was not in the statutory form.

A licence by the hirer to the owner to enter and take possession of the goods hired upon default in the payment of the rent is not capable of assignment to a third party.

Where an agreement for the hire and ultimate purchase by the hirer of specified articles of furniture provided that, on payment by the hirer of an agreed price, which was to be paid in a fixed number of periodical instalments, the articles should become his property, but until the agreed price had been fully paid they should remain the property of the lender. It was further provided that if default should be made in the punctual payment of the hire, the lender might immediately enter upon the dwelling-house of the hirer and take possession of, and remove and sell the goods. During the currency of this agreement the lender assigned all his rights and interest under the agreement to a person who had lent him money, as security for the advance, authorising him, if default should be made in repayment of the loan as agreed, to exercise all the powers contained in the hiring agreement,

until the balance due to him should have been repaid. *Held*, that the licence to enter and retake possession of the goods was not capable of being assigned (*e*).

In the above case it was contended that even though the assignment was a bill of sale, the instalments which accrued due under the hire-purchase agreement after the commencement of the lender's bankruptcy never became due to any one but the trustee in bankruptcy, and could not be assigned by the lender so as to defeat the title of the trustee. It was held, however, that the assignment of the instalments which accrued due under the hiring agreement after the commencement of the bankruptcy of the assignor was valid as against the trustee in the bankruptcy (*f*).

Assignment by the Hirer.—The hirer may be precluded by the terms of the agreement, and from the fact that his indebtedness to the owner is of a personal nature (*g*), from assigning his interest under the agreement. By arrangement with the owner, however, another person may be substituted in his place; but such an arrangement is in effect a new agreement, and not an assignment.

(*e*) *In re Davis & Co., Ex parte Rawlings*, 22 Q. B. D. 193 following *Broom* v. *Metropolitan Counties Life Assurance Society*, 28 L. J. Q. B. 236.

(*f*) See and compare *Ex parte Nicholls, Re Jones*, 22 Ch. D. 782; *Wilmot* v *Alton*, [1897] 1 Q. B. 17.

(*g*) *Humble* v. *Hunter*, 12 Q. B. 310, at p. 317; see *Tolhurst* v. *Portland Cement Manufacturers, Ltd.*, [1901] 1 K. B. 811.

Assignment for Benefit of Creditors. — An insolvent debtor frequently makes an arrangement of his affairs by an assignment of his property to a trustee to realise and distribute the proceeds amongst those of his creditors who assent to take the benefit of the assignment. In effect an assignment places the debtor's estate into the hands of a trustee, who deals with it for the benefit of the creditors. Usually the assignment is made by a deed executed by the debtor, assigning all his property to the trustee in trust for the creditors, of whom frequently a committee is formed to watch over the trustee's administration, and the deed also arranges for the release of the debtor from legal proceedings for the recovery of the debts due to the assenting creditors.

Where a hirer, under a hire-purchase agreement, makes an assignment for the benefit of his creditors, and he is in possession of the goods hired, the owner may find himself in opposition to a claim to the goods by the trustee in possession under the deed of assignment.

The owner under a hire-purchase agreement drawn within *Helby* v. *Matthews* (*h*), it is submitted, would clearly be entitled to the goods; but his position under one amounting to an agreement "to buy goods" as in *Lee* v. *Butler* (*i*),

(*h*) [1895] A. C. 471, *ante*, p. 33.
(*i*) [1893] 2 Q. B. 318.

and within sect. 9 of the *Factors Act*, 1899 (*k*), is not so clear.

In the case of *Kitto* v. *Bilbie, Hobson & Co.* (*l*), where—

A person, in possession of a gas engine under a hiring agreement, assigned to a trustee for the benefit of his creditors, all his stock-in-trade, plant, machinery, goods, etc. The trustee took possession of the stock, including the gas engine, but subsequently the person from whom the engine was hired broke into the premises and seized the engine. In an action for trespass by the trustee :—

Held, that the engine, not being the property of the assignor but only hired, did not pass to the trustee under the assignment, and that consequently there was no "transfer" within the meaning of sect. 9 of the Factors Act, 1889; that there was no "delivery" within the meaning of the same section, as, though physical delivery of the engine was made to the trustee, still the debtor did not intend to deliver anything not included in the assignment, and this engine was not so included.

Williams, J., in the course of his judgment in the above case, said :—"The question I have to decide is, whether the gas engine was the plaintiff's or the defendants'. No doubt at the commencement the engine was the property of the defendants, who let it to Coote under a hiring agreement. I know no reason why these agreements ought to be regarded

(*k*) 52 & 53 Vict. c. 45.
(*l*) 72 L. T. 266.

with disfavour, as all sorts of people are enabled to make a start by reason of the existence of these agreements. . . . Although I doubt whether an assignment for the benefit of creditors would be within the provisions of sect. 9 and sect. 2, this present assignment could not in any circumstances be within those provisions. If this was a case of ordinary bankruptcy this gas engine would not go to the assignee. . . ."

The following is the form of hire-purchase agreement used in the above case :—

This agreement made and entered into this 9th day of April, 1894, between Bilbie, Hobson & Co., engineers (hereinafter called the owners), and R. J. Coote (hereinafter called the hirer) witnesseth that the hirer hereby hires and the owners hereby lend one horse-power second-hand Otto gas engine complete, with water tank, exhaust box, belonging to the owners, upon the following terms and conditions :—

1. On the sum of £32 being paid to the owners in deposit £10, and six instalments of £3 13*s.* 4*d.* each, the first instalment to be paid on or before the 9th May, 1894, and each subsequent instalment on the 9th day of each succeeding calendar month, the engine and appurtenances to belong, without further payment, to the hirer:

2. In case of default in the punctual payment of any instalment the instalments previously paid shall be forfeited to the owners, who shall thereupon be entitled to resume possession of the said engine, the understanding

being that until full payment of £32, the engine remains the sole and absolute property of the owners. It is not to be removed from the undermentioned address, can be inspected at any reasonable time by any duly authorised agent or servant of the owner, and is only lent on hire to the hirer, who shall take all reasonable care of it during the hiring, and in case of damage by fire or accident or otherwise, bear the loss or risk. No change in the situation of the engine to other premises, or any transfer of the engine, to be made without the authority of the owners.

This agreement shall not be construed to operate in any way as a contract for the sale of the gas engine, but only as an arrangement for the hire thereof, and unless and until the hiring terminates the hirer shall have no right or property in the said engine at law or in equity, save and except as bailee thereof for hire.

CHAPTER IX.

POSITION OF THE PARTIES IN RELATION TO THIRD PERSONS.

The Hirer's Title.—The hirer, being a bailee under a contract of bailment, has a "qualified property" in the goods hired, or as otherwise termed a "possessory title," which is good against all persons who cannot show a better right (*a*). It follows from this that a hirer in possession of hired goods can maintain and recover damages for interference with his possession, or for any injury done to the goods. The right to recover damages was at one time thought to be limited by the fact already noticed (*b*) that a hirer is not liable to the owner for any loss or injury, unless caused by his negligence or that of his servant. In the case of *Claridge* v. *South Staffordshire Tramway Company* (*c*), where—

The owner of a horse delivered it to the plaintiff, an auctioneer, for sale, with liberty to use it until sold.

(*a*) See Beal's Law of Bailments (1900), p. 73; *Nyberg* v. *Handlelaar*, [1892] 2 Q. B. 202.
(*b*) *Ante*, p. 62.
(*c*) [1892] 1 Q. B. 422.

Whilst the horse was being driven by the plaintiff's servant along a highway, it was frightened by a steam tramcar of the defendants which was travelling at an improper speed. The horse in consequence plunged, fell, and injured itself. The accident was wholly due to the defendants. The plaintiff brought an action to recover the diminution in value of the horse. It was held, that the plaintiff, being clearly under no liability to his bailor for the damage to the horse in that he had not been guilty of any negligence, could not recover the damages claimed.

In this case the judges distinguished between the right to bring an action against the wrongdoer and the measure of damages recoverable in such action, holding that though there was a right of action, the plaintiff, having suffered no damage, could recover nothing. This case was considered and overruled by the Court of Appeal in *The Winkfield* (*d*), where it was held that, in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have a good answer to an action by the bailor for damages for the loss of the thing bailed. The Master of the Rolls in his judgment clearly states the law as to the relation of a bailee, in possession, to third parties. In the course of his judgment he said:—

(*d*) [1902] P. 42.

"It seems to me that the position, that possession is good against a wrongdoer and that the latter cannot set up the *jus tertii* unless he claims under it, is well established in our law, . . . a long series of authorities establishes this in actions of trover and trespass at the suit of a possessor. And the principal being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious action of the defendant. I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor. . . . I think also that the obligation of the bailee to the bailor to account for what he has received in respect of the destruction or conversion of the thing bailed has been admitted so often in decided cases that it cannot now be questioned; and further, . . . I think it can be shewn that the right of the bailee to recover cannot be rested on the ground suggested in some cases, namely, that he was liable over to the bailor for the loss of the goods converted or

destroyed, . . . in *Burton* v. *Hughes* (*e*) the plaintiff, who had borrowed furniture, and was therefore bailee, was held to be entitled to sue in trover wrongdoers who had seized it, without giving in evidence the written agreement under which he held it. The point made for the defendant was that 'the qualified interest having been obtained under a written agreement could not be proved except by the production of that agreement duly stamped.' The argument on the other side was 'that the existence of some kind of interest having been established the precise nature of it or the terms upon which it was acquired were immaterial to the support of the action.' . . . The ground of the decision in *Claridge's case* (*f*) was that the plaintiff in that case, being under no liability to his bailor, could recover no damages. . . . I think this position is untenable. . . . The case of *Rooth* v. *Wilson* (*g*) is a clear authority that the right of the bailee in possession to recover against a wrongdoer is the same in an action on the case as in an action of trover, if indeed authority were required for what seems obvious in point of principle.

(*e*) 2 Bing. 173; 27 R. R. 578.
(*f*) *Ante*, p. 84.
(*g*) 1 B. & Ald. 59.

> There the gratuitous bailee of a horse was held entitled to recover the full value of the horse in an action on the case against a defendant by whose negligence the horse fell and was killed. The case was decided by Lord Ellenborough, C. J., Bayley, Abbott, and Holroyd, JJ. The three latter seem to me to put it wholly on the ground that the plaintiff was in possession and the defendant a wrongdoer. . . ."

This case clearly sets out that the possession of goods by a hirer is a good title against a wrongdoer. The hirer in possession of goods hired can sue for damages if the goods are converted or damaged, and it is to the hirer, the possessor of the goods, that the damages are to be paid. He may have to account to the owner of the goods, but that does not affect his position in regard to a third person.

The Owner's Position.—Under a hire-purchase agreement the owner parts with the possession of the goods for good consideration to the hirer, and while the privity of the bailment remains, the owner cannot bring an action against a wrongdoer for trespass or trover (*h*). Where an owner of goods bails them to another for reward, the hirer is, while

(*h*) See Addison's Law of Torts, 8th ed., p. 573.

the bailment lasts, the proper person to bring these actions (*i*). To support an action for tort in respect of goods, the plaintiff must have possession or the right of immediate possession. This right to immediate possession without actual possession is sometimes called "constructive possession." This constructive possession is sufficient to support an action against a wrongdoer. If a hirer or carrier of goods wrongfully delivers them to a third party, the bailment is thereby determined and the immediate right of possession at once reverts to the bailor, and he can sue in conversion either the bailee or the person to whom the goods were delivered (*k*). Under a properly drawn hire-purchase agreement any wrongful act or default on the part of the hirer at once determines the contract. And the right to the possession of the goods revests in the owner and gives him an immediate right of action against not only the hirer, but any third party interfering with the goods. Where—

Furniture was let for hire with an option of purchase under a hire-purchase agreement, which contained a clause giving the owners the right without previous notice to determine the hiring and retake possession of

(*i*) *Ward* v. *Macauley*, 4 T. R. 489; *Gordon* v. *Harper*, 7 T. R. 9; *Pain* v. *Whittaker*, Ry. & Moo. 99; see also *post*, p. 167.
(*k*) *Cooper* v. *Willomatt*, 1 C. B. 672; *Wyld* v. *Pickford*, 8 M. & W. 443.

the furniture if it should at any time be seized or taken in execution. The furniture was taken in execution by the high bailiff of a county court; and no claim having been made to it, was appraised and sold under the execution and the proceeds paid into court, and the furniture delivered to the purchaser. On the day after the sale the owners heard for the first time of the seizure and sale of the furniture, and gave notice of their claim to the proceeds. An interpleader summons was issued at the instance of the high bailiff, and in the course of the interpleader proceedings the execution creditor admitted the title of the claimants, who gave notice claiming damages against the high bailiff in respect of the alleged conversion of the furniture by selling it:—

Held, that, as under the hiring agreement the claimants had a right to retake possession immediately upon its being taken in execution, the sale by the high bailiff amounted to an act of conversion for which he was responsible in damages to them (*l*).

Pawnbrokers.—If the hirer of goods under a hire-purchase agreement pawns the goods, the contract of bailment is determined and at Common Law the owner of the goods would have an immediate right of action against the pawnbroker. In general a pledgor can give no better title than he has himself unless he has authority to pledge the goods from the true owner (*m*). There is an implied

(*l*) *Jelks* v. *Haywood* (*Hackney Furnishing Co., claimants*), [1905] 2 K. B. 460; *post*, p. 153.

(*m*) *Cheeseman* v. *Exell*, 6 Exch. 341; *Singer Manufacturing Co.* v. *Clark*, 5 Ex. D. 37.

undertaking on the part of the pledgor that he has a good title to pledge the goods; if he has none the pawnbroker may, notwithstanding his own implied undertaking to redeliver to the pledgor, deliver the goods to the true owner (*n*).

This Common Law position has been altered by the *Factors Act*, 1889 (*o*), under which a pawnbroker may obtain a good title to the goods as against the owner. In the case of *Lee* v. *Butler* (*p*), where the hire-purchase agreement contained no clause allowing the hirer to determine the contract by returning the goods to the owner, the agreement was held to be one of sale and not of hire and to come within sect. 9 of the Act, and that a purchaser of the goods from the hirer obtained a good title as against the owner. This case was followed in that of *Thompson* v. *Veale* (*q*), where a hirer obtained possession of goods under a hire-purchase agreement in which there was no power given to the hirer to determine the hiring. The hirer pledged the goods with the defendant, a pawnbroker. It was held that the hirer was in possession of the goods under an agreement to buy within the meaning of sect. 9 of the *Factors Act*, 1889, and that a transfer by way of pledge to the defendant, who

(*n*) *Cheeseman* v. *Exell*, above.
(*o*) 52 & 53 Vict. c. 45; *ante*, p. 29.
(*p*) [1893] 2 Q. B. 318.
(*q*) 74 L. T. 130; *ante*, p. 33.

received the goods in good faith and without notice of the claim of the plaintiffs, was valid. In *Helby* v. *Matthews* (*r*), where the owner of a piano let it out on hire under an agreement by which the hirer had the power to terminate the hiring by delivering up the instrument, and the hirer pledged the piano with a pawnbroker, who took it in good faith and without knowledge of the agreement. It was held that the pawnbroker had not obtained a good title to the piano under sect. 9 of the Act on the ground that the agreement was one of hire with an option of purchase and that the hirer had not "agreed to buy" the piano.

Under sect. 25 of the *Pawnbrokers Act*, 1872 (*s*), it is provided that—

> The holder for the time being of a pawn-ticket shall be presumed to be the person entitled to redeem the pledge, and, subject to the provision of this Act, the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn-ticket, and he is hereby indemnified for so doing.

The protection given to the pawnbroker by this section was necessary owing to the practice of

(*r*) [1895] A. C. 471 ; *ante*, p. 33.
(*s*) 35 & 36 Vict. c. 93.

transferring pawntickets from person to person and also that the pawner may lose or have the ticket stolen from him. The indemnity, however, only operates as between the pawnbroker and the pawner or an owner who has authorised the pledge, and the section in no way affects the Common Law right of an owner of property pledged against his will who claims by a title superior to that of the pawner.

Where the plaintiffs, who carried on (*inter alia*) the business of letting out sewing machines on hire, let a machine to one Elizabeth Smith under a hire-purchase agreement. Shortly afterwards the machine was pledged with the defendant in the name of Brown, but whether by Elizabeth Smith, or by some other person with or without her consent, did not appear. The plaintiffs obtained knowledge of the pledge and demanded the delivery of the sewing machine. This the defendant refused to do, and the matter rested there for some time. Later the defendant delivered the machine to a person producing the pawn-ticket relating thereto on the payment of the loan and profit. The plaintiffs brought an action against the defendant in trover for wrongful conversion of the sewing machine, and claimed damages. It was held, that the indemnity given by sect. 25 of the Pawnbrokers Act, 1872, applies only as between the pawnbroker and the pawner or the owner who has authorised the pledge, and the Act does not affect the Common Law right of the owner of property which is pledged against his will. The plaintiffs obtained judgment (*t*).

(*t*) *Singer Manufacturing Co.* v. *Clark*, 5 Ex. D. 37.

By *section* 19 of the same Act (*u*) it is provided that—

A pledge pawned for above ten shillings shall, when disposed of by the pawnbroker, be disposed of by sale by public auction, and not otherwise, and the regulations in the fifth schedule to this Act shall be observed with reference to the sale. A pawnbroker may bid for and purchase at a sale by auction, made or purporting to be made under this Act, a pledge pawned with him; and, on such purchase, he shall be deemed the absolute owner of the pledge purchased.

The position under this section is similar to that under section 25 considered above. This section only operates as between the pawnbroker and the pawner and in no way affects the title of the true owner unless he authorises the pledge. Where—

An owner of a cycle let it out on hire and the hirer fraudulently pawned it, the pledge, not being redeemed within the proper times, was put up for auction and bought by the pawnbroker. He sold it to the plaintiff, Burrows, who took it to the owner to repair. The owner recognised it as his property and refused to give it up. Burrows then brought an action to recover the bicycle, and contended that sect. 19 of the Pawnbrokers Act, 1872, gave him an absolute title. It was held that the bicycle belonged to the defendant, and that no property was given to the pawnbroker as against the true owner;

(*u*) 35 & 36 Vict. c. 93.

the section deals only with the rights as between the pledgor and the pledgee (*x*).

A person purchasing goods which have been pawned against the owner's will, including the pawnbroker himself, does not gain a title to the goods as against the true owner of the pledge, except in so far as the law of market overt affects the sale.

Auctioneers.—It often happens that a person, in possession of goods under a hire-purchase agreement, disposes of them through an auctioneer. The general rule is that an action for conversion will lie against an auctioneer who sells and delivers goods without the consent of the true owner, even though he does so innocently.

The owner of certain household furniture assigned it by bill of sale to the plaintiffs. Subsequently to the assignment, the assignor employed the defendants, a firm of auctioneers, to sell it by auction on her behalf at her private residence. The defendants, who had no notice of the bill of sale, accordingly sold the furniture at the assignor's residence, and in the ordinary course of business delivered it, there, to the purchaser. The plaintiffs brought an action for trover. *Held*, that the defendants were liable (*y*).

(*x*) *Burrows* v. *Barnes*, 82 L. T. 721.
(*y*) *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495; see also *Barker* v. *Furlong*, [1891] 2 Ch. 172.

Where an auctioneer acts as a broker confining himself to negotiating the sale, and leaves it to the principal to deliver possession, this is a ministerial act and does not amount to a conversion on his part (*z*). The protection afforded to a purchaser of goods in market overt does not protect an auctioneer selling in market overt from the consequences of a sale and delivery on his part amounting to a conversion (*a*). However, where goods are delivered to an auctioneer (in cases covered by the *Factors Act*, 1889 (*b*)) by a mercantile agent in the course of his ordinary business, or by a buyer and seller in possession of the goods with the consent of the true owner, the auctioneer is not liable for dealing with the goods if he acts in good faith and without notice of the owner's claim.

Where the plaintiffs let a piano under an agreement whereby the hirer agreed:—

To pay the owners, without demand, 15*s.* 6*d.* per month for the hire of the piano, such sum to become due and payable in advance, and all expenses of carriage:

To keep the piano at his residence and not to remove it without the knowledge and consent of the owners:

To keep the piano in good order (reasonable wear excepted) and to allow the owners to enter the premises and inspect it:

(*z*) *Cockrane* v. *Rymell*, 40 L. T. 744.
(*a*) *Delaney* v. *Willis*, 14 L. R. Ir. 31
(*b*) 52 & 53 Vict. c. 45.

Not to remove any label, or deface the number on the piano :

That in case of default in punctual payment of the monthly sum of 15*s.* 6*d.*, or if the hirer should assign or underlet, or seek to assign or underlet the piano, or should be served with any legal process in bankruptcy or otherwise, or should negotiate with his creditors for liquidation of his affairs (of which service or negotiation he was to give the owners notice), or should do or suffer to be done any other act or thing repugnant to any of the above terms or conditions, the owners might, without prejudice to their right to recover arrears of hire and damages for breach of the agreement, immediately, and without giving notice, terminate the hiring and retake possession of the piano :

In case the piano be damaged or destroyed by fire or otherwise, the hirer undertook to be responsible for the loss.

"NOTE" (signed by the owners).—"If 32 guineas is paid as hire for the pianoforte herein by monthly hire instalments, as per this agreement, the said pianoforte is then to become the property of the hirer."

The hirer obtained possession of the piano under the agreement, and delivered it to the defendant, an auctioneer, to be sold by auction, some instalments being unpaid. The defendant received the piano in good faith, without notice of the plaintiffs' rights, sold it, and paid the proceeds to the hirer. In an action for conversion of the piano :—

Held, that the hirer had agreed to buy and had obtained, with the consent of the plaintiffs, possession of the piano ; that the delivery by the hirer to the defendant had the same effect as if the hirer were a mercantile

agent; that the words "delivery under any agreement of sale" (*c*) were not confined to delivery to the person receiving the goods pursuant to a sale by the person delivering them; that the words "agreement for sale, pledge, or other disposition" included a delivery of goods to be sold, by the person receiving, for the benefit of the person delivering, and therefore that the defendant was protected from liability by sect. 9, Factors Act, 1889 (*d*).

In the above case, which must be read in view of the subsequent decision of the House of Lords in *Helby* v. *Matthews* (*e*), the hire-purchase agreement, which contained no clause allowing the hirer to determine the contract by returning the piano to the owners, was held to amount to an agreement to buy goods. And it seems to follow that where an auctioneer *bonâ fide* sells goods for a hirer under an agreement which does not amount to an agreement to buy, he will be liable to the owner of the hired goods for wrongful conversion.

(*c*) See sect. 9, Factors Act, 1889, *ante*, p. 29.
(*d*) *Shenstone & Co.* v. *Hilton*, [1894] 2 Q. B. 452.
(*e*) [1895] A. C. 471; *ante*, p. 33.

CHAPTER X.

LIEN.

Lien for Repairs.—Where goods held under a hire-purchase agreement need repair, and the hirer delivers them to a tradesman to execute those repairs, the tradesman has a lien on the goods for the cost of the repairs. Before an owner can obtain possession of the goods from the tradesman he must satisfy the claim for repairs. The law on this point was considered in the case of *Keene v. Thomas* (*a*)—

Where by a hire-purchase agreement the plaintiff let a dog-cart to a person, who in the course of time sent the cart to be repaired to the defendant, who was a coach-builder. The hire-purchase agreement contained a clause by which the hirer undertook "to keep and preserve the dog-cart from injury." Some instalments under the agreement being unpaid, the plaintiff sought to recover the dog-cart, but the defendant claimed a lien upon it for the cost of the repairs. *Held*, that under the circumstances the hirer had authority to send the cart to be repaired, and therefore that the defendant's lien was good, not only against the hirer, but also against the plaintiff.

(*a*) [1905] 1 K. B. 136.

Lord Alverstone, C.J., in the course of his judgment, said:—

> "This case raises an important point and one on which there is not much direct authority. I am rather surprised indeed that there is not more, but probably hire-purchase agreements were not so common formerly as they are now. . . . The real question that we have to decide is that stated by Alderson, B., in *Buxton v. Baugham* (*b*), namely, whether the man who made the bargain with the repairer had authority from the plaintiff to make such a bargain. . . . The hire-purchase agreement expressly says that Robertson (the hirer) is 'to keep and preserve the said dog-cart from injury (damage by fire included).' . . . The clause does give Robertson authority to take care of the cart and to keep it in proper order, and that in my opinion implies an authority on the plaintiff's behalf to get the trap repaired if it needed repair, as it cannot be contended that Robertson was bound to do the repairs with his own hands. The case of *Buxton v. Baugham* is not an authority in favour of the plaintiff. The facts there are not the same. . . . The principle laid down by Collins, J., in

(*b*) 6 C. & P. 674.

the case of *Singer Manufacturing Co. v. L. & S. W. Rail. Co.* (*c*) goes a long way to support the proposition that the hirer is entitled to use the hired chattels for all reasonable purposes, and in my opinion in this case the hirer of the chattel having undertaken to keep it in repair, and having at any rate a duty to take care of it, and having employed the defendant to repair it, has created a lien in respect of the proper cost of the repairs, not only against himself, but also against the plaintiff, the owner of the trap."

In face of the above decision and where the goods hired are of a nature to require repair the hirer may be made to stipulate that the owner alone shall execute the necessary repairs. The following form of clause to this effect is suggested :—

That if the said shall require to be repaired the hirer shall allow the owner alone to execute the repairs at the hirer's expense, and the owner shall be entitled to the possession of the said for such purpose.

Innkeeper's Lien.—By the Common Law an innkeeper is bound to receive all guests who come to his house (*d*). Over the goods of his guests he

(*c*) [1894] 1 Q. B. 833.

(*d*) *Kirkman* v. *Shawcross*, 6 T. R. 14, at p. 17 ; *Hawthorn* v. *Hammond*, 1 C. & K. 404 ; *Ansell* v. *Waterhouse*, 6 M. & Sel. 385.

has a general lien for the whole of his bill. It does not matter whether they belong to the guest or another, and whether they are known to be another's property or not by the innkeeper. The lien also includes all goods brought by a husband and wife to an inn, even though credit may be given to the husband alone (*e*).

Where—

A commercial traveller, employed by a firm who dealt in sewing machines, went to stay at an inn, and whilst there machines were sent to him by his employers in the ordinary course of business for the purpose of selling them to customers in the neighbourhood. Before the goods were so sent the innkeeper had express notice that they were the property of the employers, but he received them as luggage of the traveller, who subsequently left the inn without paying his bill for board and lodging :—

Held, that the innkeeper had a lien upon the goods for the amount of the bill (*f*).

Lord Esher, in his judgment in the above case, pointed out that "the duties, rights and liabilities of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment but upon the custom of the realm in regard to innkeepers."

Where—

The plaintiffs were piano manufacturers in London, and the defendant was an innkeeper of Leicester Place.

(*e*) *Gordon* v. *Sibler*, 25 Q. B. D. 491.
(*f*) *Robins & Co.* v. *Gray*, [1895] 2 Q. B. 501

A guest of the defendant, then residing at the hotel, went to the plaintiffs and requested the use or loan of a grand piano, and one was sent to the hotel for the use of the guest. This piano remained at the inn for a considerable time in the possession of the guest, who finally left the hotel owing the defendant a bill for a considerable amount. The defendant refused to deliver up the piano unless the bill was previously paid. It was held that an innkeeper is not justified in detaining for his unpaid bill a piano borrowed of a manufacturer by a guest *whilst* residing at the inn, the innkeeper knowing it had been so borrowed (*g*).

This case was decided on the ground that it did not come within the custom of the realm, the piano in question not being brought by the guest into the inn as his own, it being sent by the plaintiffs with the knowledge of the host for a temporary purpose only, and it was known by the defendant to belong to the plaintiffs.

Where, however—

The defendant kept an hotel on Lake Windermere, and one Butcher came there with his wife and sister, and, in addition to board and lodging, had a private sitting-room. He brought with him a pianoforte, which the defendant thought was Butcher's own, but which he had hired of the plaintiff. The piano was put in the sitting-room. Butcher left the inn in debt to the defendant, who claimed as against the plaintiff to detain the piano by virtue of his lien as an innkeeper.

(*g*) *Broadwood and Another* v. *Granara*, 10 Exch. 417.

It was held, that, whether the defendant as innkeeper was bound to take in the piano or not, having done so he had a lien upon it (*h*).

In this case it was attempted, on behalf of the plaintiff, to set up the decision in *Broadwood v. Granara* (*i*), and also that under the Common Law the defendant was not bound to accept the piano, and that being so the Common Law lien did not extend to it. Lord Coleridge, C.J., in the course of his judgment, said:—

> "It is admitted that in general an innkeeper has a lien on all goods which his guest brings with him as his own, whether they are his own or another's, and the only question raised is, whether the lien extends to the goods which the innkeeper would not have been bound to receive. I may say that I should be inclined to agree, if a guest brought a piano with him for his own amusement, that, according to the advanced usage of society, the innkeeper might be well held to be bound to receive it, if he has room for it. But it is quite unnecessary to decide that question, because the defendant having taken in the piano and safely kept it, it is too clear to be doubted that he has a lien upon it."

(*h*) *Threfall* v. *Borwick*, 10 Q. B. 210.
(*i*) Above.

At Common Law the innkeeper had no authority, in addition to his lien, to sell any goods left with him (*k*). Now, by the *Innkeepers Act*, 1878 (*l*), a power of sale in addition to the right of lien is given in certain circumstances. The Act allows the innkeeper, to sell by public auction any goods left by a guest indebted to him for board, lodging, or keep of horses, after the said goods have been left with him for six weeks without the debt having been paid, provided that at least one month's notice of the sale shall have been given by an advertisement containing a description of the goods and the name of the owner where known.

While the lien is in existence, and the goods are in the possession of the innkeeper as bailee, he is not bound to exercise more care in keeping the goods than in keeping his own (*m*).

(*k*) *Mulliner* v. *Florence*, 3 Q. B. D. 484.
(*l*) 41 & 42 Vict. c. 38.
(*m*) *Angus* v. *McLachlan*, 23 Ch. D. 330; *Dawson* v. *Channey*, 5 Q. B. 164.

CHAPTER XI.

GUARANTEE.

In some cases it is wise for an owner of goods let out on the hire-purchase system to obtain a guarantee from some substantial person as to the good faith of the hirer.

A guarantee is a collateral engagement to answer for the debt, default, or miscarriage of another, as distinguished from an original and direct engagement for the party's own act (*a*).

In general a party cannot be liable on a guarantee, unless the principal is also liable, but in the case of a guarantee to answer for an infant's contract the surety would be responsible though the infant might not be.

A guarantee, as a simple contract, must have a sufficient consideration to support it (*b*). The mere existence of the debt, default, or miscarriage, in respect of which it is given, is not a sufficient

(*a*) Chitty on Contracts, 15th ed., p. 524.
(*b*) *French* v. *French*, 2 Man. & G. 644.

consideration. There must be some further consideration for the promise of the guarantor. A promise to pay a debt already incurred by another is not binding on the surety, without some new consideration (*c*) such as a forbearance on the part of the owner of hired goods in not retaking possession of the goods on a default by the hirer. It is not necessary for the consideration to be directly between the person giving and receiving the guarantee. It is enough if the person for whom the guarantor becomes surety receives a benefit, or the person to whom the guarantee is given suffers some inconvenience as an inducement to the surety to become guarantor for the principal debtor.

Under sect. 4 of the *Statute of Frauds* (*d*) a guarantee to be enforceable must be in writing and signed by the party sought to be charged or by his agent. The section provides—

"that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged

(*c*) *Payne* v. *Wilson*, 7 B. & C. 423; *Johnston* v. *Nicholls*, 1 C. B. 251.
(*d*) 29 Car. II., c. 3.

therewith, or some other person thereunto by him lawfully authorised (*e*).

Before the *Mercantile Law Amendment Act*, 1856 (*f*), the consideration for the promise had to appear on the face of the instrument. Now by section 3 of the above Act it is provided that—

"No special promise to be made by any person after the passage of the Act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding, to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from the written document."

Now parol evidence may be given to supply the consideration.

The surety in guaranteeing the performance of the contract is only liable for such damages as are occasioned by the failure of the principal to perform his part of the agreement (*g*). The

(*e*) See *Birkmyr* v. *Darnell*, 1 Sm. L. C. 299; *Lakeman* v. *Mountstephen*, L. R. 7 H. L. 17.

(*f*) 19 & 20 Vict. c. 97.

(*g*) *Warre* v. *Calvert*, 7 Ad. & E. 143; *Whitcher* v. *Hall*, 5 B. & C. 269.

principal, however, must perform the contract strictly, or the surety will be liable (*h*).

Certain acts will operate as a discharge of a surety from responsibility. Chiefly, they are as follows (*i*) :—

(1) Any fraudulent misrepresentation or concealment on the part of or within the knowledge of the creditor.

(2) The creditor's connivance at the principal's default; a forbearance for a short period will not operate as a discharge.

(3) Non-performance of the conditions of the contract by the creditor.

(4) The failure of an intended co-surety to execute.

(5) Payment by the principal will discharge the surety.

(6) Alteration of the terms of the contract, as between the creditor and the principal, unless it is one which cannot be prejudicial to the surety; a binding agreement to give time to the principal will discharge the surety, a voluntary forbearance as to time will not.

(*h*) *London, Brighton and South Coast Rail. Co.* v. *Goodwin* 3 Exch. 736; *Eastern Union Rail. Co.* v. *Cochrane*, 9 Exch 197.

(*i*) See Chitty on Contracts, 15th ed., p. 538, and cases quoted thereon.

In the case of *Hewison* v. *Ricketts* (*k*), where the defendant guaranteed, in consideration of the plaintiffs' returning certain goods held by the hirer under a hire-purchase agreement, which the plaintiffs had seized, the payment of the future instalments by the hirer under the agreement. Default having again been made by the hirer, the plaintiffs, before having recourse to the surety, seized the goods and thereby determined the hire-purchase agreement. By so doing the plaintiffs lost their right to sue the hirer and therefore could not recover the unpaid instalments from the guarantor, the principal being discharged. The following is the material part of the guarantee given in the above case:—

"Now I, the said Edward Ricketts, in consideration of the said Peter Frank Hewison and George Peacock at my request returning to the said George Guerin the two omnibuses so seized and taken possession of as aforesaid, do hereby agree and undertake to pay to them, the said Peter Frank Hewison and George Peacock, the sum of £12, being the sum in arrear as aforesaid, and for the consideration aforesaid I do further guarantee to the said Peter Frank Hewison and George Peacock, the punctual payment of instalments hereafter to accrue, due under the hereinbefore recited agreement, until the full amount thereby agreed to be paid shall be paid as therein mentioned. And I further undertake to pay to the said

(*k*) 63 L. J. Q. B. 711; *ante*, p. 67.

Peter Frank Hewison and George Peacock, each and every such instalments as they become due, in case default shall hereafter be made in the payment of such instalments by the said George Guerin in the manner and at the times and place as in the said agreement mentioned."

The validity of the guarantee was in no way challenged, the case being decided on the ground that the principal being discharged the surety could not be held liable.

The following is a suggested form of a guarantee for the due performance of the hirer's part under a hire-purchase agreement:—

In consideration of the Western Furnishing Co. of , having at my request, by a written contract dated the day of , 19 , agreed to lend on hire to of (therein called the hirer), goods specified in the schedule thereto. I, the undersigned, hereby guarantee to the said Western Furnishing Co. the due observance and performance by the said hirer of the several stipulations on his part to be observed and performed including the payment of the therein mentioned monthly instalments. And I agree that this guarantee shall not be in anywise avoided, released, or affected by the said Western Furnishing Co. giving time to the said hirer or granting him any indulgence or by the said Western Furnishing Co. and the said hirer making any variation in the terms of the said contract provided that no variation shall make me liable for a

greater maximum sum under this guarantee than that for which I am liable as the said written contract now stands.

Dated this day of 19 .

Signature

As witness etc.

CHAPTER XII.

DISTRESS FOR RENT, RATES, AND TAXES.

Distress for Rent.—A landlord can recover rent not only by action, but by the ancient remedy of distress, and he may, as a general rule, seize and sell without legal process all goods found on the demised premises. Distress is a remedy given to the landlord by the Common Law and applied to all goods whether belonging to the tenant or a stranger. At Common Law, however, the goods were only a pledge in the hands of the landlord, his right of sale being given later by statute (*a*).

The following are the important conditions precedent to the right of making a distress :—

There must be a demise express or implied :

The demise must be subsisting at the time the rent, for which the distress is made, falls due :

The demise must be one of real and corporeal hereditaments :

(*a*) See Foa on Landlord and Tenant, 4th ed., p. 476.

Where the demise is of a house or apartments with furniture therein (*b*), or of a room in a factory with steam-power supplied (*c*), the rent is deemed to issue out of the realty alone, and such demise will therefore support a distress.

The demise must reserve a specific rent:

The rent must be payable at a time certain:

The demise must reserve a reversion to the distrainor, and such reversion must be vested in him at the time of the distress.

If a landlord distrains for rent in the absence of any of the above conditions he is guilty of, and liable for, a wrongful distress. An express power may be given by agreement where any of the conditions are not in existence, but such an agreement will not affect the goods of a third party.

A landlord may, however, deprive himself of his right to distrain by an agreement with the tenant or a third person. Such an agreement may apply generally (*d*) or to specific goods. Arrangements of this kind are not uncommon in reference to things brought into demised premises by third persons (*e*). If a landlord in spite of such agreement levies a

(*b*) *Newman* v. *Anderton*, 2 N. R. 224.
(*c*) *Marshall* v. *Schofield*, 52 L. J. Q. B. 58.
(*d*) *Welsh* v. *Rose*, 6 Bing. 638.
(*e*) *Gough* v. *Wood & Co.*, [1894] 1 Q. B. 713, at p. 716.

distress upon the goods an action will lie against him for trespass or conversion (*f*).

The following is a simple form of an agreement by a landlord not to distrain on goods hired by his tenant under a hire-purchase agreement:—

In consideration of the Western Furnishing Co. of having by a written contract dated the day of 19 , agreed to lend on hire to of my tenant, goods specified in the schedule thereto;

I, the undersigned, hereby agree not to distrain, seize, or sell the said goods, or to cause or allow the same to be distrained, seized, or sold.

Dated this day of 19 .

Signature

As witness etc.

A landlord may also, by his conduct, lose his right to distrain:—

Where the plaintiff deposited household furniture at a depository to be warehoused at the rate of 30*s.* a year. At the time he thought he was depositing them with a company with whom he had had dealings before; and he received a receipt in the name of the company, which name was also over the door of the depository. The fact was that the company had sold their business to B., and let the premises to him, and they authorised the use of their name. B. being in arrears for rent,

(*f*) *Horsford* v. *Webster*, 1 Cr. M. & R. 696; *Giles* v. *Spencer*, 3 C. B. N. S. 244; 26 L. J. C. P. 237.

the defendants seized and sold the plaintiff's goods under a warrant of distress from two of the directors of the company, on which the plaintiff brought an action against the defendants:—

Held, that the company were estopped from distraining as landlords by having allowed themselves to be held out as the person with whom the goods were deposited (*g*).

The Common Law rule that all movable goods on the demised premises, at the time of the distress, were liable to seizure has now many exceptions (*h*). The following are those of importance to this subject:—

1. Things annexed to the freehold (*i*). Moreover, fixtures removable at the will of the tenant during his term are also privileged (*k*).

2. The wearing apparel and bedding of the tenant or his family, and the tools and implements of his trade up to the value of £5. These exceptions are by force of the *Law of Distress Amendment Act*, 1888 (*l*).

Bedding includes a bedstead, as well as the articles of bedding upon it (*m*). An article hired

(*g*) *Miles* v. *Furber*, L. R. 8 Q. B. 77; see also *Fowkes* v. *Joyce*, 2 Vern. 129.

(*h*) See *Simpson* v. *Hartopp, and notes thereto*, 1 Sm. L. C., 11th ed., p. 437.

(*i*) *Crossley Bros., Ltd.* v. *Lee*, [1908] 1 K. B. 86; *ante*, p. 57.

(*k*) *Darby* v. *Harris*, 1 Q. B. 895.

(*l*) 51 & 52 Vict. c. 21, s. 4; and see The County Court Act, 1888 (51 & 52 Vict. c. 43), sect. 147.

(*m*) *Davis* v. *Harris*, [1900] 1 Q. B. 729.

by the tenant to use in the support of himself and family is an "implement" within the meaning of the Act (*n*). A cab, of the value of £25, hired by a cabdriver (the tenant) and driven by him, being the only thing upon the premises capable of being taken in distress, was held to be an "implement of trade" and privileged (*o*). A sewing machine hired by the tenant's wife under a hire-purchase agreement, and used by her in helping to maintain the household, was held to be exempt from distress (*p*).

3. Things in actual personal use (*q*).

4. Lodgers' goods under the *Law of Distress Amendment Act*, 1908 (*r*), by which it is provided that if the landlord levies a distress for rent due from his immediate tenant on the goods of a lodger, the lodger may serve the superior landlord, or the bailiff or other agent, levying the distress, with a declaration in writing, setting forth that the immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels distrained, and that such goods are the property or in the lawful possession of the lodger, and are not goods to which the Act is expressed

(*n*) *Churchward* v. *Johnson*, 74 J. P. 326.
(*o*) *Lavell* v. *Ritchings*, [1906] 1 K. B. 481 ; see and compare *Addison* v. *Shepherd*, [1908] 2 K. B. 118.
(*p*) *Masters* v. *Fraser*, 85 L. T. 611.
(*q*) *Simpson* v. *Hartopp*, Willes, 512 ; 1 Sm. L. C., 11th ed., p. 437, and notes thereto.
(*r*) 8 Edw. VII., c. 53, sect. 1 ; see further, *post*, p. 130.

not to apply (*s*). The declaration must also contain a statement of the amount of rent (if any) due from the lodger to the immediate tenant and the dates at which future instalments will accrue, and an undertaking to pay to the superior landlord any rent due or to become due until the arrears of rent due from the immediate tenant have been paid off. A correct inventory of the goods in question must be annexed to the declaration. Any false declaration or inventory is made a misdemeanour by section 2 of the Act.

If the superior landlord, or his agent, in spite of such a declaration and undertaking on the part of the lodger, shall levy or proceed with the distress, he shall be guilty of an illegal distress. And the lodger may apply for an order of restoration of the goods to a stipendiary magistrate or to two justices of the peace in places where there is no stipendiary magistrate (*t*).

The landlord and bailiff are also liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may be inquired into (*u*). Such an inquiry may also be made in proceedings before the magistrate (*w*).

(*s*) See section 4, *post*, p. 133.
(*t*) Section 2.
(*u*) *Lowe* v. *Dorling*, [1906] 2 K. B. 772, decided under sect. 2 of the Lodgers' Goods Protection Act, 1871.
(*w*) 8 Edw. VII., c. 53, sect. 2.

The *Lodgers' Goods Protection Act*, 1871 (*x*), repealed in so far as the *Law of Distress Amendment Act*, 1908, applies. Neither of these Acts gives any definition of the word "lodger." In a case under the former Act the existence of the relationship of landlord and lodger was held to be a question of fact (*y*). The general rule is that to constitute a lodger there must be a control (such as having a room in the house) retained over the premises by the landlord (*z*), and the lodger must reside and sleep upon the premises (*a*). The definition of the term "lodger" is not now of such importance, as section 1 of the latter Act extends protection to under-tenants paying a rack-rent for the premises, or such part thereof, as is comprised in the under-tenancy (*b*).

5. Agricultural implements and machinery under the *Agricultural Holdings Act*, 1908 (*c*). Sect. 29 (4) provides:—

"Agricultural or other machinery which is the property of a person other than the tenant, and is on the holding under an agreement with the tenant for the hire or use thereof in the conduct of his business . . . shall not be distrained for rent."

(*x*) 34 & 35 Vict. c. 79.
(*y*) *Ness* v. *Stevenson*, 9 Q. B. D. 245.
(*z*) *Phillips* v. *Henson*, 47 L. J. C. P. 273.
(*a*) *Heawood* v. *Bone*, 13 Q. B. D. 179.
(*b*) *Post*, p. 130.
(*c*) 8 Edw. VII., c. 28.

Thus the owners of machinery and implements lent to tenants coming within the Act are protected, and in addition sect. 30 provides a summary remedy for the return of the goods seized (*d*).

6. Frames, looms, or machines used in the woollen, cotton, or silk manufactories are protected by statute from seizure (*e*).

7. Gas meters and fittings for the use of gas, let on hire by a gas company under the *Gasworks Clauses Acts*, 1847 and 1871 (*f*). By sect. 14 of the 1847 Act "the undertakers may let for hire any meter for ascertaining the quantity of gas consumed or supplied, and any fittings for the gas . . . and such meters and fittings shall not be subject to distress . . . for rent of the premises where the same may be used." It has been held under this section that a gas-stove let for hire was within the words "fittings for gas," and therefore was not subject to distress for rent (*g*).

8. Meters and fittings for the supply of water and apparatus for electric lighting are also protected by statute (*h*).

(*d*) *Post*, p. 146.
(*e*) 6 & 7 Vict. c. 40, sects. 18, 19.
(*f*) 10 & 11 Vict. c. 15, sect. 14; and 34 & 35 Vict. c. 41, s. 18.
(*g*) *Gas Light and Coke Co.* v. *Hardy*, 17 Q. B. D. 619.
(*h*) Waterworks Clauses Acts, 1847 (10 & 11 Vict. c. 17) and 1863 (26 & 27 Vict. c. 93), and the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56).

9. The goods of the persons named in the *Law of Distress Amendment Act*, 1908 (*i*).

The general rule being that a landlord, apart from the above exceptions and a few more which here need not be considered, can seize any goods found upon the demised premises; it frequently happens that goods held under a hire-purchase agreement are taken in distress for rent. In levying a distress the landlord is bound to observe a certain well-defined process (*k*), which, if not followed, makes the distress illegal or irregular, and gives the owner of the goods seized a remedy for the wrongful seizure.

Distress, by whom made.—Originally a distress for rent might be levied by the person to whom the rent was due, or by any person authorised by him to make the levy. Now, by the *Law of Distress Amendment Act*, 1888 (*l*), "no person shall act as bailiff to levy any distress for rent unless he shall be authorised to act as a bailiff by a certificate in writing under the hand of a County Court judge"; and "if any person not holding a certificate under this section shall levy a distress contrary to this Act, the person so levying" (now by force of sect. 2 of the *Law of Distress Amendment Act*,

(*i*) 8 Edw. VII., c. 53; *post*, p. 130.
(*k*) See Foa, Landlord and Tenant, 4th ed., p. 531.
(*l*) 51 & 52 Vict. c. 21, sect. 7.

1895 (*m*)), "shall, without prejudice to any civil liability, be liable on summary conviction to a fine not exceeding £10, and any person who authorises him so to levy shall be deemed to have committed a trespass."

The Acts in no way interfere with the landlord's right of distraining in person (*n*).

Entry.—Entry for the purpose of distress must be made at a lawful time and in lawful manner, or the distress will be bad *ab initio*. A distress can only be levied in the daytime—that is, between sunrise and sunset (*o*). Nor is it legal to distrain on a Sunday (*p*).

It is illegal to break into the premises (*q*), but entrance may be gained through a partially opened door or window (*r*). Entry may also be obtained by climbing over a fence or wall, and such an entry is not unlawful (*s*) so long as the enclosures are not broken down or outer doors forced open (*t*).

Fraudulent Removal of Goods.—The general rule, that goods *on* the demised premises can alone

(*m*) 58 & 59 Vict. c. 24.
(*n*) *Hogarth* v. *Jennings*, [1892] 1 Q. B. 907.
(*o*) *Tutton* v. *Darke*, 5 H. & N. 647.
(*p*) *Werth* v. *London and Westminster Loan Co.*, 5 Times L. R. 521.
(*q*) *Long* v. *Clark*, [1894] 1 Q. B. 119.
(*r*) *Crabtree* v. *Robinson*, 15 Q. B. D. 312.
(*s*) *Eldridge* v. *Stacey*, 15 C. B. N. S. 458.
(*t*) *Long* v. *Clark*, *supra*.

be seized, was often taken advantage of by tenants who, by the removal of their goods to another place, avoided a seizure. By the *Distress for Rent Act*, 1737 (*u*), a landlord may, within thirty days, follow and take any goods, wherever found, which had been fraudulently removed from the demised premises to avoid a distress, unless they have, before the seizure, been sold to a *bonâ fide* purchaser. Section 3 of the Act makes a tenant fraudulently removing or concealing goods, or any person knowingly assisting him to do so, liable to the landlord for double the value of the goods removed or concealed. To enable the landlord to proceed under this statute the removal must be fraudulent or clandestine after the rent has fallen due, and the goods must have been distrainable if they had remained on the premises.

The Act does not apply, and this deserves notice, to goods which are not the property of the tenant at the time of the removal. Where—

A tenant of the plaintiff had given the defendants a bill of sale over his furniture, and the defendants seized the furniture under their bill of sale, and within five days removed it by the authority of the tenant, with the intention of preventing the plaintiff distraining for rent then due. It was held, that the furniture being the property of the defendants as grantees of the bill of

(*u*) 11 Geo. II., c. 19, sect. 1.

sale, an action for double value under 11 Geo. II., c. 19, sect. 3, would not lie against them (*x*).

Seizure.—A seizure is necessary in order to complete the levy. As between the landlord and tenant it may be constructive—that is, no actual taking of the goods is necessary. An entry and inspection of the goods with an after-served notice has been held to be a sufficient seizure (*y*). The same rule holds good as between a landlord and third persons. For although no action will lie on the part of the landlord against a third party for removing goods which have not, as a matter of fact, been seized (*z*), any act, successful or not, to prevent the removal of goods on the ground of rent being in arrear is a distress.

W. occupied lodgings in the defendant's house at a weekly rent. He brought a piano with him, which he had hired of the plaintiffs. The plaintiffs sent two men to fetch away the piano; the defendant's wife met the men in the passage of the house outside the room in which the piano was, and having been informed by them their object, said, in the presence of W., who was at the door of the room, the piano should not leave the house unless what was owing from W. for rent and board were paid. The wife was acting by the

(*x*) *Tomlinson* v. *Consolidated Credit Corporation*, 24 Q. B. D. 135.

(*y*) *Spice* v. *Webb*, 2 Jur. 943; *Swann* v. *Lord Falmouth*, 8 B. & C. 456.

(*z*) *Pool* v. *Lewin Crawcour & Co.*, 1 Times L. R. 165.

defendant's authority; and there was rent due from W. The plaintiffs having brought an action for the conversion of the piano, the defendant justified the detention as a distress. The judge directed a verdict for the defendant.

Held, that there might be a distress without actual seizure, and that what had occurred amounted to a distress (*a*).

In the case of *Werth* v. *London and Westminster Loan Co.* (*b*), an action brought by a landlord against the loan company, the defendants seized and removed goods between three and four in the morning, in spite of an earlier claim on the part of the landlord to detain the goods for rent due. The landlord obtained judgment on the ground that his claim to detain the goods amounted to a distress. At a later date the defendants attempted to say that the distress, being levied between three and four in the morning, was illegal, but the landlord's claim of an earlier date was held a sufficient distress (*c*).

Sale.—Entry having been obtained, the goods seized and impounded, the landlord, at Common Law, could only retain the goods until the rent was paid.

(*a*) *Cramer & Co.* v. *Mott*, L. R. 5 Q. B. 357, following *Wood* v. *Nunn*, 5 Bing. 10.
(*b*) 5 Times L. R. 320.
(*c*) 5 Times L. R. 521; *ante*, p. 122.

He could in no way dispose of them. It is now provided by statute (*d*) that—

"where any goods shall be distrained for rent, and the tenant or *owner* of the goods so distrained shall not within five days next after such distress taken and notice thereof (with the cause of such taking) is left at the chief mansion house, or other most notorious place on the premises, replevy the same, then the person distraining may cause the goods to be sold for the best price that can be gotten for them, towards satisfaction of the rent, charges of the distress and sale, leaving the overplus for the owner's use.

By the *Law of Distress Amendment Act*, 1888 (*e*), sect. 6, the five days given to the tenant or owner under 2 Will. & Mar. sess. 1, c. 5, can be extended to fifteen days if the tenant or owner so request in writing and gives security for any additional costs incurred by the delay.

The notice of distress must be in writing and should give what goods are taken (this is usually done by means of an inventory), and the amount of the rent in arrear. In all cases personal notice is sufficient, and preferable to one left at the "chief mansion house or other most notorious place on the premises."

By sect. 5 of the *Law of Distress Amendment Act*, 1888, the tenant or owner of the goods and chattels

(*d*) 2 Will. & Mar. sess. 1, c. 5, sect. 2.
(*e*) 51 & 52 Vict. c. 21.

may by writing require the person distraining to have the goods appraised by two appraisers, the cost of such appraisement to be borne by the person requesting it.

The landlord cannot sell the goods seized until the expiration of the five or fifteen days as the case may be. He has, however, a reasonable time allowed him to sell after the lapse of the above period. It is usual for a search to be made in the County Court, to see if the goods have been replevied. Formerly the place of sale was restricted. Now the tenant or owner may, in writing, request that the goods be sold not on the premises, but at a public auction-room or other suitable place (*f*). The sale need not be by public auction. The purchaser must be some third person, the landlord cannot purchase the goods himself :—

The defendants, being makers of sewing machines, let one to a tenant of the plaintiffs on a hire-purchase agreement, which contained a clause providing that the defendants should have power to seize the machine if the instalments were in arrear. The rent of the premises let to the tenant by the plaintiffs became in arrear, and they put in a distress, and seized the sewing machine among other things. At a sale by auction of the goods distrained, the manager of the plaintiffs bought the sewing machine on their behalf. The plaintiffs then

(*f*) The Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), sect. 5.

re-let the machine to the tenant on a hire-purchase agreement. The instalments due under the original hire-purchase agreement of the defendants having fallen into arrear, they (the defendants) seized the sewing machine under the authority of that agreement. An action was brought against them by the plaintiffs for conversion in so doing. It was held that a sale in pursuance of 2 Will. & Mar. sess. 1, c. 5, sect. 2, of goods distrained must be a sale to a third party, and if a landlord purchases the goods himself no property passes. Therefore the defendants had a good title to the machine (*g*).

The effect of the sale is to transfer the ownership of the goods to the purchaser, and to put an end to the right to replevy them. It has never been directly decided whether a purchaser obtains a good title to goods sold under an illegal distress. It was held by the Court of Appeal that an illegal distress is altogether void so as to permit a subsequent distress for the same rent (*h*), and it seems to follows that, the goods sold not having been "distrained" at all, the purchaser can have no title to them (*i*).

Under *2 Will. & Mar. sess.* 1, *c.* 5, *sect.* 2, any overplus there may be from the sale, after satisfaction of the rent and expenses, should be left in the hands of the sheriff, under-sheriff, or constable for the owner's use. If this is not done an action will lie against

(*g*) *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.*, [1904] 1 K. B. 820, following *King* v. *England*, 4 B. & S. 782.
(*h*) *Grunnel* v. *Welch*, [1906] 2 K. B. 555.
(*i*) Foa, Landlord and Tenant, 4th ed., p. 551.

the landlord on the statute in which the correctness of the charges may be questioned (*k*). An action will not lie for money had and received (*l*). In regard to surplus goods the landlord may return them to the premises of the tenant if removed therefrom, even though a third party may have claimed them and given notice of his claim.

Where goods distrained for rent in arrear have been removed to a convenient place for sale and sufficient sold to satisfy the distress, the proper course is for the broker to leave the surplus money with the sheriff and return the surplus goods to the premises from whence he took them. D. assigned his furniture to the plaintiff as a security for money advanced. The deed of assignment provided that on default in payment of the principal or interest on a day named, or such earlier day as the plaintiff should appoint by notice, it should be lawful for the plaintiff to take possession of the furniture; but that until default D. should hold it. D. being indebted to his landlord for rent, the defendant, a broker, distrained the furniture. The plaintiff gave notice to D. to pay the principal money and interest, and he afterwards gave notice to the defendant that D. had assigned the furniture to him. The defendant on receiving this notice said that he would "take care it was properly acted upon." The goods were removed from D.'s house to an auction room, and sufficient having been sold to satisfy the distress, the defendant

(*k*) *Lyons* v. *Tomkies*, 1 M. & W. 603.
(*l*) *Yates* v. *Eastwood*, 6 Exch. 805.

returned the surplus goods to D.'s house and gave the surplus money to D.

Held, First, that there was no conversion of the goods by the defendant. Secondly, that the action for money had and received could not be maintained for the surplus money (*m*).

The costs and charges for distress are regulated by the Distress for Rent Rules, 1888 (*n*), made under the provisions of the *Law of Distress Amendment Act*, 1888 (*o*).

The Law of Distress Amendment Act, 1908 (*p*).—This Act deserves attention, for it introduces a new principle into the law of distress and it marks a further departure from the Common Law rule that all goods found on the demised premises could be distrained for rent. It has already been noticed in connection with the exemption of lodgers' goods (*q*). The following are the material sections of the Act:—

> 1. If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of—
>
> (*a*) any under-tenant liable to pay by equal instalments not less often than every actual or

(*m*) *Evans* v. *Wright*, 2 H. & N. 527.
(*n*) Rules 15 & 16.
(*o*) 51 & 52 Vict. c. 21, sect. 8.
(*p*) 8 Edw. VII., c. 53.
(*q*) *Ante*, p. 117.

customary quarter day of a year a rent which would return in any whole year the full annual value of the premises or of such part thereof as is comprised in the under-tenancy, or

(*b*) any lodger, or

(*c*) *any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or any part thereof,*

for arrears of rent due to such superior landlord by his immediate tenant, such under-tenant, lodger, or *other person* aforesaid may serve such superior landlord, or the bailiff or other agent employed by him to levy such distress, with a declaration in writing made by such under-tenant, lodger, or *other person* aforesaid, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such under-tenant, lodger, or *other person* aforesaid, and are not goods or live stock to which this Act is expressed not to apply; and also in the case of an under-tenant or lodger setting forth the amount of rent (if any) then due to his immediate landlord, and the times at which future

instalments of rent will become due, and the amount thereof, and containing an undertaking to pay to the superior landlord any rent so due or to become due to his immediate landlord, until the arrears of rent in respect of which the distress was levied or authorised to be levied have been paid off, and to such declaration shall be annexed a correct inventory, subscribed by the under-tenant, lodger, or *other person* aforesaid, of the furniture, goods, and chattels referred to in the declaration; and, if any under-tenant, lodger, or *other person* aforesaid, shall make or subscribe such declaration and inventory knowing the same or either of them to be untrue in any material particulars, he shall be deemed guilty of a misdemeanour.

2. If any superior landlord, or any bailiff or other agent employed by him, shall, after being served with the before-mentioned declaration and inventory, and in the case of an under-tenant or lodger after such undertaking as aforesaid has been given, and the amount of rent (if any) then due has been paid or tendered in accordance with that undertaking; levy or proceed with a distress on the furniture, goods, or chattels of the under-tenant, lodger, or *other person* aforesaid, such superior land-

lord, bailiff, or other agent shall be deemed guilty of an illegal distress, and the under-tenant, lodger, or *other person* aforesaid, may apply to a justice of the peace for an order for the restoration to him of such goods, and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the under-tenant, lodger, or *other person* aforesaid, in which action the truth of the declaration and inventory may likewise be inquired into.

4. This Act shall not apply—

(1) to goods belonging to the husband or wife of the tenant whose rent is in arrear, nor to goods comprised in any bill of sale, *hire-purchase agreement*, or settlement *made by such tenant*, nor to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof, nor to any live stock to which

section twenty-nine of the Agricultural Holdings Act, 1908, applies:

(2) (*a*) to goods of a partner of the immediate tenant; (*b*) to goods (not being the goods of a lodger) upon premises where any trade or business is carried on in which both the immediate tenant and the under-tenant have an interest; (*c*) to goods (not being goods of a lodger) on premises used as offices or warehouses where the owner of the goods neglects for one calendar month after notice (which shall be given in like manner as a notice to quit) to remove the goods and vacate the premises; (*d*) to goods belonging to and in the office of any company or corporation on the premises the immediate tenant whereof is a director or officer, or in the employment of such company or corporation:

Provided that it shall be competent for a stipendiary magistrate, or where there is no stipendiary magistrate for two justices, upon application by the superior landlord or any under-tenant, or other such person as aforesaid, upon hearing the parties to determine whether any goods are in fact goods covered by sub-section (2) of this section.

Prior to this Act the landlord's Common Law right to distrain on all goods on the premises over-rode

the right of the owner to goods unpaid for under a hire-purchase agreement (*r*), unless the hired goods were of a description to come within any of the earlier exceptions already dealt with.

Section 1 of the Act protects the goods of three classes of persons from distress, namely, those of an under-tenant paying what amounts to a rack-rent for the premises occupied by him; of a lodger (who was formerly protected by the *Lodgers' Goods Protection Act*, 1871) (*s*); and those of "*any other person whatsoever.*"

Apart from the limitations contained in section 4 of the Act, any goods the property of any of the above classes of persons are protected from seizure provided that the person claiming protection makes the declaration, inventory and undertaking as required. Section 4 of the Act, however, greatly reduces the sweeping character of the first section, and sub-section (1) is of special importance to owners of hire-purchase goods. The goods expressly excepted in this sub-section are—those belonging to the husband or wife of the *tenant whose rent is in arrear, those comprised in any* bill of sale, *hire-purchase agreement*, or settlement *made by such tenant*, and those in the possession, order, or

(*r*) *Green* v. *Marsh*, [1892] 2 Q. B. 330; *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.*, [1904] 1 K. B. 820.
(*s*) 34 & 35 Vict. c. 79.

disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof. This latter part is similar in language and effect to section 44, sub-sect. (iii.), of the *Bankruptcy Act*, 1883 (*t*).

It is clear that where the goods are held by the husband or wife of the tenant whose rent is in arrear, he or she cannot claim any privilege on the ground of being either—

1. An under-tenant,
2. A lodger, or
3. "Any other person whatsoever."

So, although goods of an under-tenant or lodger are protected under section 1, that protection is removed if such under-tenant or lodger is the wife or husband of the tenant.

Moreover, under section 1 of the Act, an owner of the goods let out under a hire-purchase agreement would have come within the class "*any other person whatsoever*"; but under section 4, sub-sect. (1), the landlord's power of distress is not interfered with over goods in the possession of his tenant under a hire-purchase agreement made by such tenant. Thus, if an owner of goods lets them out under a hire-purchase agreement made by the tenant, such goods are still liable to be seized by the landlord as

(*t*) 46 & 47 Vict. c. 52; see Williams' Bankruptcy Practice, 9th ed., p. 231; *ante*, p. 42.

distress for rent. Where, however, goods are hired and in the possession of the wife of the tenant under a hire-purchase agreement made, not with the tenant, but by her, such goods are exempt from seizure, being the goods of some "*other person whatsoever*," under section 1 of the Act. The following case of *Shenstone & Co.* v. *Freeman* (*u*), recently decided in the Divisional Court on appeal from the Lambeth County Court, is of importance hereon :—

The action was brought by the plaintiffs, a firm of pianoforte dealers, against the defendant, a bailiff, for the alleged illegal seizure of a piano belonging to the plaintiffs in default of certain rent due in respect of the premises from which it was taken. The tenant of the premises was a man named Wyard, whose wife had obtained the piano from the plaintiffs under a hire-purchase agreement by the terms of which the plaintiffs remained the owners of the piano until all the instalments under the agreement had been paid. In point of fact, only one such instalment had been paid. The piano having been seized for the rent due, the plaintiffs, following the procedure prescribed by section 1 of the Law of Distress Amendment Act, 1908, served a declaration upon the landlord of the premises, in which they stated that the piano was their property and that the tenant of the premises had no right or property or beneficial interest in it, and subsequently instituted proceedings in the County Court.

(*u*) 26 Times L. R. 416.

The County Court judge held, upon certain facts proved before him, that the seizure was justified upon the ground that the piano was in the possession, order, or disposition of the tenant by the consent and permission of the true owner, under such circumstances that he was the reputed owner thereof. He therefore gave judgment for the defendant. The plaintiffs appealed.

It was contended, upon behalf of the defendant, that the words of section 4, "*made by such tenant*," referred only to a *settlement* and not to a hire-purchase agreement or bill of sale. That being so, the goods in the present case comprised in the hire-purchase agreement made by Mrs. Wyard were liable to seizure.

Darling, J., in giving judgment, said :—

"This case is one which gives rise to considerable difficulty as to how to construe this Act of Parliament. It is a very recent Act, passed only two years ago, and one might construe it quite logically in at least two different ways. We must therefore see if we can gather what is the fair meaning of the words, applying the principle stated by Lord Justice Farwell with regard to the Lodgers' Goods Protection Act, 1871, which related to the exemption of lodgers' goods in the case of *Lowe* v. *Dorling and Son* (*x*). He said :—'Acts of Parliament are not, in my experience, expressed with such accuracy and precision as to justify the Court in striking out unambiguous words in order to make a sentence grammatical or logical. The generality of the maxim, 'Expressum facit cessare tacitum,' which was relied on, renders caution necessary in its application. It is not enough that the express and the tacit are

(*x*) [1906] 2 K. B. at p. 784.

merely incongruous; it must be clear that they cannot reasonably be intended to co-exist.' This Law of Distress Amendment Act was really an Act to amend the law as it was left by the Lodgers' Protection Act, 1871. To clear away what I regard as immaterial matters and come to the exact point we have to decide, in my opinion, this piano, which had been let on a hire-purchase agreement by the plaintiffs to Mrs. Wyard, was, in the words of sect. 4 of the Law of Distress Amendment Act, 'goods belonging to' the plaintiffs. I think the piano was not comprised in any hire-purchase agreement made by the tenant, because Mrs. Wyard, who made the agreement for hiring the piano, was not the tenant. Now it was argued that the piano was in the possession of the tenant Wyard. I do not think it was, but I am not prepared to say that there was absolutely no evidence that it was so. Granting, for the sake of argument, that the piano was in Wyard's possession . . . there was no evidence that it was in his possession by the consent and permission of the true owners. The words of the statute are, 'Goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is reputed owner thereof.' I do not think that there was any evidence whatever that the piano was in possession of Wyard by the consent and permission of the plaintiffs, and even if it were I do not think that there was any evidence that it was in his possession in such circumstances that Wyard is to be taken as the true owner. That clears away every contention laid before us except the one which arises under the words of the section, "This Act shall not apply to goods

belonging to the husband or wife of the tenant whose rent is in arrear, nor to goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant.' Now it is said that these words mean 'settlement made by such tenant,' that they do not relate to a bill of sale or a hire-purchase agreement to which the tenant was a party. . . . I come to the conclusion that these words 'shall not apply to any hire-purchase agreement' really mean a hire-purchase agreement to which the tenant was a party in some way. Take the case of a person who has given a bill of sale over some of his furniture, or the more simple case of a person who has got a motor-car on a hire-purchase agreement and goes to stay with a friend who owes his landlord rent. Suppose the landlord puts in a distress for rent whilst the owner of the motor-car was stopping there. If the defendant's contention is right that motor-car could be seized for the rent of the friend with whom the owner of the motor-car is staying. . . . The Act under consideration was an amendment of the Lodgers' Protection Act, and is it possible that it intended to subject a casual visitor to a house, in respect of which rent might be owing, to the liability of having the motor-car in which he came seized for rent which he was ignorant that his friend owed, merely because the motor-car was subject to a bill of sale or had been procured under a hire and purchase agreement? Take another simple case. If one sends for a doctor in the country, in all human probability he will come in a motor-car. Suppose he comes and puts his motor-car in the coach-house and stays for some time, and it happens that, whilst he is there, a distress is put in and the

doctor's car is seized. In such circumstances, if the construction of this statute contended for by the defendant is right, it would follow that because the tenant of the premises owed rent and the doctor's motor-car was subject to a hire-purchase agreement or a bill of sale it was liable to be seized, although if it had been paid for outright it could not have been seized. I do not say the case is clear, and Parliament may have meant that this is to be the law, although I do not think that it ought to mean it. I think the words can be read in the way contended for by the plaintiffs, and that such a reading is more consonant with what I think they ought to mean than the construction put upon them by the defendant. That being so the appeal must be allowed."

Bucknill, J., delivered judgment to the same effect. He observed that if the argument put forward on the part of the defendant was to prevail, the result would be that lodgers would be in a far worse position than they had been between the years of 1871 and 1908.

When goods are being hired by a married woman solely on her own behalf, the owners should insert the following clause into the agreement:—

"*It is hereby declared that the owners have entered into this agreement upon the express declaration by the hirer, and the hirer hereby expressly declares that she is entering into this agreement wholly and solely on her own behalf, and not on behalf, or in any way as agent of, her husband.*

In all cases of hiring out furniture or goods to persons who are lodgers or under-tenants, it would be wise for the owners to inform the hirers of their rights under this Act, and to set before them the procedure necessary to prevent the goods being taken in distress by the superior landlord.

The Owner's Remedies.—Where goods let out on the hire-purchase system are lawfully distrained for rent of the premises in which they are, the owner of the goods is entitled to redeem them and to be reimbursed by the hirer against the money paid to redeem them, and in the event of the goods being sold, the owner is entitled to recover the value of them from the hirer (*y*).

Remedies for Wrongful Distress.—A distress may be illegal, irregular, or excessive.

Illegal Distress.—If a landlord distrains when there is no right of distress or if in levying it he does not comply with the requirements as laid down by the law, he is guilty of an illegal distress.

The following are the chief grounds for declaring a distress to be illegal :—

A distress by a landlord after he has parted with the reversion ;

A distress when no rent is in arrear ;

(*y*) *Edmunds* v. *Wallingford*, 14 Q. B. D. 811.

A distress made after a valid tender of the rent due has been made;

A distress off the demised premises, such as on the highway;

A distress levied at unlawful hours;

A distress made in unlawful manner, such as by breaking open doors or windows;

Seizing goods privileged from distress;

Distraining goods contrary to an agreement with the tenant or a stranger;

Selling goods not distrained or not included in the inventory.

In case of an illegal distress the owner of the goods has an action for damages for the improper distress. The action should be brought against the person committing the act complained of, and not against the landlord, unless he expressly authorised the act, or ratified it afterwards. Where—

A landlord authorised bailiffs to distrain for rent due to him from his tenant of a farm, directing them not to take anything except on the demised premises. The bailiffs distrained cattle of another person (supposing them to be the tenant's) beyond the boundary of the farm; the cattle were sold and the landlord received the proceeds:—

Held, that the landlord was not liable in trover for the value of the cattle, unless it were found by the jury that he ratified the act of the bailiffs with knowledge of

the irregularity or that he chose without inquiry to take the risk upon himself, and to adopt the whole of their acts (*z*).

An action will also lie against the landlord where no right to distrain exists at all (*a*). The damages recoverable are the value of the goods seized (*b*).

Under 2 *Will. & Mar. sess.* 1, *c.* 5, *sect.* 5, where no rent was in arrear, or where none was due to the person who has distrained, the owner of the goods may recover double their value against the wrong-doer. Less damages than double cannot be awarded to a successful plaintiff in an action under this statute (*c*). In the case of an illegal distress the owner of the goods may perhaps sue in trover any purchaser or person into whose hands they may have come, as having taken them from a person who had no title to dispose of (*d*).

Irregular Distress.—A distress is irregular where, though the levy itself was legal and in order, the subsequent proceedings are conducted in an unlawful manner.

Selling the goods distrained without giving proper notice of distress with inventory to the tenant;

(*z*) *Lewis* v. *Read*, 13 M. & W. 834.
(*a*) *Swire* v. *Leach*, 18 C. B. N. S. 479.
(*b*) *Attack* v. *Bramwell*, 3 B. & S. 520; *Keen* v. *Priest*, 4 H. & N. 236.
(*c*) *Masters* v. *Farris*, 1 C. B. 715.
(*d*) Foà, Landlord and Tenant, 4th ed., p. 576.

Selling within the five or fifteen days allowed to replevy;

Selling without appraisement when required;

Improper dealing with any surplus from the sale.

An irregular distress is not illegal; the distrainer is not considered to be a trespasser *ab initio*. The remedy is an action for damages brought against either the landlord or his bailiff (*e*). The only damage recoverable is the special damage suffered. Where no actual damage has resulted to the plaintiff, he cannot succeed in the action (*f*).

A person purchasing goods under an irregular distress acquires a good title to the goods, for in such a case trover does not lie against the landlord, the remedy being the action for damages.

Excessive Distress.—A landlord seizing more goods than are reasonably necessary to meet the rent due and expenses is guilty of an excessive distress.

The owner's remedy is by an action for damages under the *Statute of Marlbridge* (*g*). The question whether a distress is excessive or not is one of fact (*h*). The damages recoverable are the value of the goods less the rent and expenses (*i*).

(*e*) *Kerby* v. *Harding*, 6 Exch. 234.
(*f*) *Rodgers* v. *Parker*, 18 C. B. 112.
(*g*) 52 Hen. III., c. 4; *Fell* v. *Whittaker*, L. R. 7 Q. B. 120.
(*h*) *Smith* v. *Ashford*, 29 L. J. Ex. 259.
(*i*) *Wells* v. *Moody*, 7 C. & P. 59.

Wrongful distress under the Agricultural Holdings Act, 1908 (*k*).—It has been noticed that agricultural implements, lent to a tenant coming within the Act, are protected from distraint (*l*). *Section* 30 (1) of the Act provides:—

Where any dispute arises—

(a) in respect of any distress having been levied on a holding contrary to the provisions of this Act: or

(b) as to ownership of any live stock distrained, or as to the price to be paid for the feeding of that stock: or

(c) As to any other matter or thing relating to a distress on a holding:

The dispute may be heard and determined by the County Court or by a court of summary jurisdiction, and any such court may make an order *for restoration of any* live stock or *things unlawfully distrained*, or may declare the price agreed to be paid for feeding, or may make such order which justice requires.

(2) Any such dispute shall be deemed to be a matter in which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts, but any person aggrieved by any decision of a court of summary jurisdiction under this section may appeal to a court of quarter sessions.

Rescue.—Where a distress is wrongful, not merely irregular or excessive, the owner (or tenant)

(*k*) 8 Edw. VII., c. 28.
(*l*) *Ibid.*, s. 29 (4); *ante*, p. 119.

may rescue the goods seized. The rescue must be effected before the goods have been impounded. It can only legally be made by the owner of the goods, his servant, or agent, and not in any event by a stranger (*m*).

Replevin.—Where goods are illegally taken in distress the owner may obtain re-delivery of them by means of the action of replevin. The owner must be prepared to give security and to restore the goods to the distrainor if the distress be upheld (*n*).

Distress for Rates and Taxes.—Rates and taxes may be recovered summarily by distress. The right of distress for rates stands on a different footing from the right to distrain for rent. It arises solely from statute and not from the Common Law.

The poor and general rates are collected under the *Poor Relief Act*, 1601 (*o*), the *Distress for Rates Act*, 1849 (*p*), the *Poor Rates Recovery Act*, 1862 (*q*), the *Metropolis Management Amendment Act*, 1862 (*r*), and the *Municipal Corporations Act*, 1882 (*s*).

(*m*) See Foá on Landlord and Tenant, 4th ed., p. 568.
(*n*) See *post*, p. 174.
(*o*) 43 Eliz. c. 2.
(*p*) 12 & 13 Vict. c. 14.
(*q*) 25 & 26 Vict. c. 82.
(*r*) *Ibid.*, c. 102.
(*s*) 45 & 46 Vict. c. 50.

The right of distress is limited to the goods of the person assessed and in default (*t*).

Assessed taxes are recoverable by distress under the *Taxes Management Act*, 1880 (*u*).

It seems that the goods of third persons, and therefore hire-purchase goods, are liable to be distrained for taxes charged upon the premises—that is, the land tax, property tax, and inhabited house duty—but not for income tax and taxes charged upon the person (*x*).

(*t*) *Stevens* v. *Evans*, 2 Burr. 1152.
(*u*) 43 & 44 Vict. c. 19, sect. 86.
(*x*) *Shaftesbury* v. *Russell*, 1 B. & C. 666; and *Juson* v. *Dixon*, 1 M. & S. 601, decided under 43 Geo. III. c. 99, sect. 33 (House Tax Act, 1803).

CHAPTER XIII.

EXECUTION.

An owner of goods, let out on the hire-purchase system, frequently has to assert his rights over the goods against a sheriff or high bailiff seizing and selling the goods under a writ of execution, and also in some cases against an innocent purchaser of the goods from the sheriff or high bailiff.

Execution issuing from the High Court is regulated by the Rules of the Supreme Court (*a*). Writs to enforce judgments of the County Court are regulated by the *County Courts Act*, 1888 (*b*), and the rules made thereunder (*c*).

The sheriff or high bailiff must at his peril seize only the goods of the person named in the warrant; if he seizes those of another, he is liable to an action, even though the goods are in the possession of, and apparently belong to, the judgment debtor (*d*).

(*a*) Order XLII., see Annual Practice, 1910, p. 602.
(*b*) 51 & 52 Vict. c. 43, sects. 146—160.
(*c*) Order XXV., Annual County Courts Practice, 1910, p. 1054.
(*d*) *Roberts* v. *Thomas*, 6 T. R. 88; *Sanderson* v. *Baker*, 3 Wils. K. B. 309; *Crane* v. *Ormerod*, [1903] 2 K. B. 37.

A right to immediate possession is essential to an owner's right to maintain trover in respect to goods seized under a writ of execution. Where goods are lent on hire for a term the sheriff or high bailiff has a right to sell the judgment debtor's interest in them, and the owner of the goods not being entitled to possession cannot maintain trover in respect to them (*e*).

Under a hire-purchase agreement drawn in usual form, the owner has a right to take possession of the goods immediately upon their being seized in execution (*f*), and this being so he can maintain an action against a sheriff or high bailiff seizing the goods under a writ of execution. If at the time of the sale the owner is entitled to take possession, the sale is an act of conversion as against him.

The plaintiffs, brewers in Dublin, supplied a customer in Wales with porter in casks on the terms that the empty casks were to be returned to Dublin at his expense and risk, within six months from the date of the contract, or paid for at invoice price, at the option of the shippers.

Held, that as soon as the casks were empty, the vendee of the porter was a mere bailee of the casks during pleasure, and that the vendors had such an immediate right of possession as entitled them to maintain

(*e*) *Dean* v. *Whittaker*, 1 C. & P. 347.
(*f*) See clauses 3 and 4, *ante*, p. 13.

trover against a sheriff who wrongfully took them in execution (*g*).

A purchaser of goods, which are not the property of the judgment debtor, seized and sold under a writ of execution obtains no title to them as against the true owner though he acts innocently in the matter.

Sect. 156 of the *County Courts Act*, 1888 (*h*), provides that—

Where any claim shall be made to or in respect of any goods taken in execution under the process of the Court, the claimant may deposit with the bailiff either the amount of the value of the goods claimed, such value to be affixed by appraisement in case of dispute, to be by such bailiff paid into Court, to abide the decision of the judge upon such claim, or the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods until such decision can be obtained, or may give to the bailiff in the prescribed manner security for the value of the goods claimed, and in default of the claimant so doing, the bailiff shall sell such goods as if no such claim had been made, and shall pay into Court the proceeds of such sale to abide the decision of the judge.

Where a claim is made to goods taken in execution by the high bailiff of a County Court, and the claimant does not make a deposit or give security

(*g*) *Manders* v. *Williams*, 4 Exch. 339.
(*h*) 51 & 52 Vict. c. 43.

as required by the above section, and the high bailiff sells the goods as he is directed to do by the section, the sale gives the purchaser a good title to the goods, although they were the property of the claimant at the time of the seizure. For it was held in the case of *Goodlock* v. *Cousins* (*i*), that where the procedure of the section had been followed, and the claimant, having given notice of his claim to the goods seized in execution, afterwards failed to fulfil the conditions imposed upon him by the section (that is, did not make the deposit or give the security required), it was not for him to say that the sale was wrongful, and that the purchaser did not acquire a good title to the goods sold.

It was claimed on the strength of the above case that the section gave a high bailiff a special privilege to sell goods not possessed by a sheriff, and to give a good title to the purchaser. Where, however, a judgment having been recovered against one Woodward in the County Court, execution was issued against his goods, and, amongst other things, a piano was seized by the high bailiff. The piano did not belong to Woodward, but to the plaintiffs, by whom it had been lent to Woodward on the hire-purchase system. The owners being unaware

(*i*) [1897] 1 Q. B. 558.

that the piano had been seized, made no claim to it. The high bailiff advertised the piano for sale, and ten days after seizure it was bought by the defendant *bonâ fide* and without notice that it was not the property of Woodward. The plaintiffs brought an action against the defendant to recover possession of the piano. It was held that where goods are taken in execution by the bailiff of a County Court, and, no claim being made to them, are sold by the bailiff, and it subsequently appears that they were not the property of the judgment debtor at the time of the seizure or sale, the purchaser does not acquire a good title to the goods as against the real owner (*k*).

In the case of *Jelks* v. *Hayward* (*Hackney Furnishing Co., claimants*) (*l*), where—

Furniture was let for hire with an option of purchase under a hire-purchase agreement, which contained a clause giving the owners the right without previous notice to determine the hiring and retake possession of the furniture, if it should at any time be seized or taken in execution. The furniture was taken in execution by the high bailiff of a County Court, and, no claim having been made to it, was appraised and sold under the execution and the proceeds paid into court, and the furniture delivered to the purchaser. On the day after

(*k*) *Crane* v. *Ormerod*, [1903] 2 K. B. 37; see also *Liver Furnishing Co.* v. *Cross*, 40 Law Journal, 57.
(*l*) [1905] 2 K. B. 460.

the sale the owners heard for the first time of the seizure and sale of the furniture, and gave notice of their claim to the proceeds. An interpleader summons was issued at the instance of the high bailiff, and in the course of the interpleader proceedings the execution creditor admitted the title of the claimants, who gave notice claiming damages against the high bailiff in respect of the alleged conversion of the furniture by selling it :—

Held, that as under the hiring agreement the claimants had a right to retake possession immediately upon its being taken in execution, the sale by the high bailiff amounted to an act of conversion for which he was responsible in damages to them.

In this case it was attempted to maintain on behalf of the high bailiff that sect. 156 of the *County Courts Act*, 1888, gave him the right of sale, and that he was protected by the statute against an action on the part of the true owners of the goods sold under the execution. It was also attempted to distinguish the case from the former one of *Crane* v. *Ormerod*.

Lord Alverstone, C.J., in the course of his judgment, said :—

". . . I adhere to the view which we expressed in this court in *Crane* v. *Ormerod* that there is no special privilege in favour of a high bailiff which does not apply in the case of a sheriff. Subject to questions which may arise upon the special provisions of sect. 156 of the County Courts Act, 1888,

I think that the liability of a high bailiff who sells goods taken in execution is the same as that of a sheriff, and that there is nothing in that Act to show that the high bailiff has any special protection where he innocently seizes and sells the goods of a third party. . . . It is a branch of the general law that the sheriff seizes and sells goods at his peril, and I see no reason why a County Court bailiff is in that respect in any better position than the sheriff. Reference was also made to *Bradley* v. *Copley* (*n*), which, when carefully examined, seems to me to differ from *Manders* v. *Williams* (*o*) because, although there had been a sale, there had been no demand entitling the owner of the goods to resume possession. That must, I think, be the true distinction between the cases, because in *Manders* v. *Williams*, that very learned lawyer, Parke, B., when dealing with *Gordon* v. *Harper* (*p*), and *Bradley* v. *Copley*, recognised that a person not entitled to possession cannot maintain trover (which is the first branch of the appellant's argument in the present case), and then went on to say that, inasmuch as the owners of the casks were entitled to their possession when they were empty, the right of possession reverted to them, and the person in whose actual possession

(*n*) 1 C. B. 685.
(*o*) 4 Exch. 339 ; *ante*, p. 150.
(*p*) 7 T. R. 9.

they were was in the position of a mere bailee during pleasure, and the action could therefore be brought by the bailor. It has been suggested during the present argument that the fact that the hirer was going to pay for the goods made a distinction, and that the rule was not the same where the person in possession of the goods was not a gratuitous bailee during pleasure. In my opinion that fact cannot make any difference if by the terms of the hiring agreement there is a right to take possession. As I have already said, I think that under the present hiring agreement, as the owner had the right to take possession of the goods immediately upon their being seized in execution, it does not matter, so far as he is concerned, whether the antecedent period was covered by a payment of rent, the rent ceasing, of course, upon possession being taken. I have therefore come to the conclusion that at the time of the sale the owners of the goods had a right to possession, and therefore that *Manders* v. *Williams* is an authority that is fatal to the contention of the appellant. . . ."

Kennedy, J., in the course of his judgment, said :—

" . . . In the present case it is indisputable that the high bailiff has sold the goods of the

claimants; he sold them because he had seized them under an execution, the seizure being lawful. Whatever interest the apparent possessor, the execution debtor, had in the goods seized, he had by the terms of the hire-purchase agreement between him and the respondents; it was an interest terminable *ipso facto* on the occurrence of such a seizure as actually took place; in other words, the respondents became entitled to the possession of the goods without notice or demand immediately upon that act of seizure by the bailiff. In order to maintain an action for conversion on the subsequent sale by the bailiff, there must be a right in the plaintiff to immediate possession of, as well as a property in the goods. In the present case there is no question that the goods sold were the property of the respondents; had they also a right to their possession at the time of the sale? In my opinion they had, because the act of the bailiff in seizing entitled them to take possession of the goods immediately upon the seizure. The respondents had not only the property in the goods, but also the right to possession at the time of the sale, and therefore it seems to me plain upon principle that, unless he is protected by some provision in the *County Courts Act*, 1888 (and it is not suggested that he is protected by any other legislation), the high bailiff, although he acted as

he did in obedience to what he believed to be his duty, is in the position of a person who has converted the goods of another by selling them. The fact that there has been no demand or act of retaking cannot avail the high bailiff when the person who has a right to retake is unaware that a state has arisen which gives that right. The sale by the high bailiff put an end to the power of the respondents to retake at all, and a person who, by selling goods to a third person or by destroying them, puts it out of the power of another, who has a right of property in them, to exercise those rights, becomes, in my opinion, liable in tort. . . ."

An owner, on hearing of a seizure of his goods under a writ of execution against the hirer, should at once give notice of his claim to the sheriff or high bailiff, as the case may be.

When a claim is made by any person to, or in respect of, any goods taken in execution, or their proceeds or value, the sheriff or high bailiff may, by means of an interpleader summons (*q*), protect himself from an action by the execution creditor, to which he might be liable, if he yielded to the claim, or from an action for conversion on the part of the claimant if he executed the writ.

(*q*) *Post*, p. 171.

Where a high bailiff applies for an interpleader summons in the County Court he must send a notice to the claimant requiring him to make deposit or give security within sect. 156 of the *County Courts Act*, 1888 (*r*). An owner, making a claim, should then either make deposit or give the security required in order that the goods should not be sold (often much below their value) under the provisions of this section. In the event of the owner not complying with the section and a sale, he would only be entitled to the proceeds of the sale on the determination of the interpleader action in his favour.

Under the statute 8 *Anne*, c. 14, sect. 1, a landlord has a right to be paid one year's rent (if so much is due) before goods are removed under an execution, and the sheriff is empowered to levy out of the goods and pay the execution creditor the amount of the execution and the sum paid to the landlord for rent due.

This statute does not apply to executions under process of the County Court (*s*). The landlord of a tenement in which goods are taken in execution may claim the rent in arrear at any time within five clear days (*t*) from the date of taking, or before

(*r*) 51 & 52 Vict. c. 43 ; *ante*, p. 151.
(*s*) Sect. 160, County Courts Act, 1888 (51 & 52 Vict. c. 43).
(*t*) Ord. LV. of the County Court Rules.

the removal of the goods. The landlord's claim is limited to the rent of four weeks where the tenement is let by the week, the amount of two terms of payment where it is let for any other term less than a year, and one year's rent in any other case. The bailiff on selling must satisfy, first, the costs of the sale, next the claim of the landlord, and finally the amount for which the warrant issued (*u*).

If a bailiff wrongfully seizes goods of a stranger on the execution debtor's premises, the landlord is not entitled to require the bailiff to levy upon them for rent (*x*).

(*u*) Sect. 160, above.
(*x*) *Beard* v. *Knight*, 8 E. & B. 865 ; *Foulger* v. *Taylor*, 5 H. & N. 202.

CHAPTER XIV.

Civil Proceedings.

In practice certain actions are of common occurrence in relation to goods held under hire-purchase agreements. They may be divided into those arising on the contract and those arising in tort from trespass or conversion to the goods.

Actions on the Contract.—If one of the parties to the agreement breaks the obligations imposed upon him by either the express or implied terms of the contract, the other party's remedy is to bring an action for breach of contract and recover damages.

The owner, in case of the hirer's default, usually resumes possession of the goods under the express terms of the agreement. He may, however, bring an action against the hirer for damages for the breach of any of the terms of the agreement, or for the recovery of money due in the form of unpaid instalments. It should be remembered that where the agreement contains no clause (such as

clause 6 (*a*)) allowing the recovery of hire and damages up to the determination of the hiring, the owner may have no action for unpaid instalments after he has seized the goods under the terms of the agreement.

Where the hirer's good faith is guaranteed by a surety or sureties, and he fails to fulfil his obligations under the agreement, the owner may sue the guarantor or guarantors for any damage he may have suffered by the hirer's breach (*b*).

The hirer may bring an action against the owner for breach of contract, for instance, if the owner fails to deliver the goods agreed to be hired, or delivers them in such a state as not to be as fit and suitable for their purpose as reasonable care and skill can make them (*c*), or if the owner in any way interferes with the hirer's enjoyment of the chattels according to the terms of the agreement.

The damages recoverable for breach of contract are those reasonably incurred by the plaintiff through the breach (*d*).

Limitation of Right of Action.—Where, as is usual, the contract is a simple one and not under seal, all actions must be brought within six

(*a*) *Ante*, p. 13, and p. 66.
(*b*) *Ante*, p. 106.
(*c*) *Ante*, p. 61 ; *Vogan & Co.* v. *Oulton*, 81 L. T. 435.
(*d*) See Mayne on Damages.

years of the cause of action arising (*e*). In the case of a contract under seal the right of action is limited to twenty years.

Actions founded on Tort.—Any injury or act disturbing the possession of goods, without the owner's consent, however temporary the act may be, is a trespass. If the interference amounts to a deprivation of possession to an extent to be inconsistent with the rights of the owner—for instance, taking, using, selling, pledging, or destroying the goods—the act then becomes a wrongful conversion. Before the Judicature Acts there were distinctions between the forms of action; in some cases trespass only lay, in others conversion, and sometimes, according to the circumstances, either lay. These distinctions are now abolished.

The following actions now exist:—

(i.) *Trespass*, to recover damages for interference with goods.

(ii.) *Trover or Conversion*, to recover the value of goods for wrongful conversion. This form of action is usually referred to as "conversion."

(iii.) *Detinue*, to obtain the return of goods wrongfully detained, with or without damages for their detention.

(*e*) 21 Jac. I. c. 16, sect. 3; 4 & 5 Anne, c. 3, sect. 19; and the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), sect. 9.

These actions are of frequent occurrence in connection with goods let out on the hire-purchase system, that of detinue being of an almost daily occurrence in the County Courts, where the action is brought by owners to recover from third persons hire-purchase goods wrongfully disposed of by the hirer.

Trespass.—The ground for this action is an actual taking of, or any direct or immediate injury to, goods (*g*). An indirect interference with the owner's possession will not support the action (*h*).

The plaintiff must have possession of the goods at the time of the trespass in order to maintain the action. An owner of goods let out on hire cannot sue for trespass unless he has the right to immediate possession. The hirer of the goods can support the action (*i*).

An action for trespass will lie for goods taken under an illegal distress, as where no rent is due or where the goods seized are privileged. Where, however, the distress is irregular the action does not lie (*k*).

A hirer of goods under a hire-purchase agreement may maintain an action of trespass against

(*g*) *Leame* v. *Bray*, 3 East, 593; *Foulkes* v. *Willoughby*, 8 M. & W. 540.
(*h*) *Hartley* v. *Moxham*, 3 Q. B. 701.
(*i*) *Ante*, p. 88.
(*k*) *Ante*, p. 145.

the owner for a wrongful taking of the goods by the latter and recover damages in respect of his limited interest.

Where by indenture of sale, A. assigned all his household furniture, goods, etc., to secure a debt due from him to the assignees, subject to a proviso that the deed should become void upon payment of the said sum on a certain day, or on some earlier day to be appointed by the assignees by a notice in writing, to be served on A. twenty-four hours before the day of payment so appointed; interest to be paid in the meantime. It was also agreed by the deed that, after default made in payment contrary to the said proviso, it should be lawful for the assignees to enter and take possession of the goods, and to sell them and reimburse themselves out of the proceeds, accounting to A. for any surplus; and that, until such default, it should be lawful for A. to hold, use, and possess the said goods without hindrance from the assignees. The assignees served A. with a notice to pay on a day earlier than that named in the deed, and afterwards entered and took and sold the goods assigned: but the notice was bad, having been served less than twenty-four hours before the day of payment appointed by the assignees.

Held, that A. had, under the deed, the right of possession of the goods, defeasible only by default in payment after due notice; and that he might therefore sue the assignees in trespass for having wrongfully entered and sold.

Held, also, that in such an action the measure of damages should be, not the value of the goods, but the

value of the plaintiff's interest in them at the time of the trespass (*l*).

An owner of hire-purchase goods who enters and seizes such goods without a sufficient default on the part of the hirer under the terms of the agreement is liable to an action of trespass.

An owner is, moreover, liable for any wrongful act of any of his servants or agents done within the scope of their employment, where—

The defendant employed a person to manage a branch of his business, which was the sale of furniture on the hire-purchase system. The manager sold a piece of furniture to a person who was lodging in the plaintiff's house, and, on one of the instalments being in arrear, went to the house and removed the furniture. While so doing he assaulted the plaintiff. For this assault he was summoned, convicted, and fined, and he paid the fine. In an action against the defendant in respect of the assault the jury found that the manager committed the assault in the course of his employment:—

Held, that the mere fact that the assault was a criminal offence, and not only a tortious act, did not affect the liability of the defendant for the act of his servant, and that the release of the servant, under 24 & 25 Vict. c. 100, sect. 45, from civil proceedings for the assault, did not release the defendant from liability (*m*).

(*l*) *Brierley* v. *Kendall*, 17 Q. B. 937; see also *Roberts* v. *Wyatt*, 2 Taunt. 268; *Turner* v. *Hardcastle*, 11 C. B. N. S. 683.
(*m*) *Dyer* v. *Munday*, [1895] 1 Q. B. 742.

Under 3 & 4 Will. IV. c. 42, sect. 29, in all actions of trespass *de bonis asportatis* the jury may, in their discretion, give damages over and above the value of the goods at the time of seizure.

Conversion.—This form of action was formerly called trover. Conversion is a wrongful dealing with goods, as by taking, using, selling, or destroying them, inconsistent with the owner's right of possession.

Any person who obtains possession of goods the property of another who has been fraudulently deprived of them and disposes of them either for his own benefit or that of another is guilty of a conversion and liable in damages to the true owner (*n*).

The owner of goods let on hire to another for a term still continuing cannot maintain this action (*o*). The hirer is the proper person to sue for a conversion by a third party (*p*). If the hirer, however, terminates the bailment by selling or otherwise disposing of the goods, the right of possession reverts to the owner, and he may at once sue the purchaser or the hirer for a conversion (*q*).

A wrongful disposal by the hirer of the goods

(*n*) *Hollins* v. *Fowler*, L. R. 7 H. L. 788.
(*o*) *Gordon* v. *Harper*, 7 T. R. 9.
(*p*) *Ante*, p. 89.
(*q*) *Cooper* v. *Willamott*, 1 C. B. 672.

hired in a manner inconsistent with the terms of the agreement is a conversion and puts an end to the bailment (*r*). The purchase of goods from a hirer having no right to sell, accompanied by taking possession, is a conversion by the buyer against the owner, although the purchaser may have acted innocently in the matter (*s*).

A pawnbroker with whom goods are wrongfully, and without the consent of the owner, pledged by the hirer, who refuses on demand by the owner to restore them to him, is guilty of a conversion, and he is not protected by the *Pawnbrokers' Act*, 1872 (*t*).

An auctioneer or other person selling goods under the instructions of a hirer having no right to dispose of the goods and delivering possession to the purchaser is liable in conversion to the owner (*u*).

The hirer of goods may maintain an action for conversion against the owner and recover damages in respect of his limited interest in the goods (*x*).

Where it is impossible to prove any positive act of conversion, it may be inferred on proof of a demand for the goods by the plaintiff and a refusal to deliver them up by the defendant, he having control over

(*r*) *Mulliner* v. *Florence*, 3 Q. B. D. 484.
(*s*) *Hilbery* v. *Hatton*, 2 H. & C. 822.
(*t*) 35 & 36 Vict. c. 93 ; *Singer Manufacturing Co.* v. *Clark*, 5 Ex. D. 37 ; see *ante*, p. 93.
(*u*) *Ante*, p. 95.
(*x*) *Ante*, p. 164 ; *Brierley* v. *Kendall*, 17 Q. B. 937.

them at the time of the demand (*y*). Where, however, the refusal is by a person who is unaware of the plaintiff's title, and having a *bonâ fide* doubt as to the title to the goods, detains them for a reasonable time for clearing up the doubt, such person is not guilty of a conversion (*z*).

The measure of damages is the actual value of the goods at the time of the conversion (*a*). Under 3 & 4 Will. IV. c. 4, sect. 29, in actions for conversion the jury may, in their discretion, give damages over and above the value of the goods.

Detinue. — This action lies for the specific recovery of personal goods wrongfully detained from the person entitled to possession of them, and also for damages sustained by the wrongful detention.

To maintain the action, the plaintiff must have the right to the immediate possession of the goods at the time of commencing the action. The injurious act being the wrongful detention of the goods, it does not matter whether the wrongdoer obtained them by lawful means such as by a bailment or finding of them, or by a wrongful act, as by a trespass or conversion, or as an innocent

(*y*) *Hollins* v. *Fowler*, L. R. 7 H. L. p. 788.
(*z*) *Isaack* v. *Clark*, 2 Buls. 306; *Vaughan* v. *Watt*, 6 M. & W 492.
(*a*) *Henderson* v. *Williams*, [1895] 1 Q. B. 521.

purchaser in a fraudulent sale by a hirer having no right to dispose of them.

The owner of hire-purchase goods can maintain the action against the hirer wrongfully holding the goods after the hiring has been determined under the terms of the agreement, or against a third person who has obtained the goods through a wrongful act, determining the hiring, of the hirer. The hirer may maintain the action against any person wrongfully detaining the goods from him.

The usual evidence of the detention is, that the defendant is in possession and has control of the goods, that the plaintiff has made a demand for the goods and that the defendant refuses to deliver them up to the plaintiff.

Where the defendant still retains the goods, the court has power to order that execution shall issue for return of the specific goods detained, without giving the defendant the option of paying damages (*b*).

Limitations of Actions. — All actions for trespass or conversion must be commenced within six years after the cause of action arising (*c*).

(*b*) R. S. C., Ord. XLVIII., r. 1; Annual Practice, 1910, p. 694; Ord. XXV., r. 69, County Court Rules; Annual County Courts Practice, 1910, p. 1071; *Hyams* v. *Ogden*, [1905] 1 K. B. 246.

(*c*) 21 Jac. I. c. 16, sect. 3 (The Limitation Act, 1623).

Interpleader. — Where the sheriff or high bailiff levies an execution on goods hired by the execution debtor under a hire-purchase agreement and the owner of the goods claims them as his property, the sheriff or high bailiff, as the case may be, seeks relief by means of an interpleader summons, whereby the owner and the execution creditor are brought before a court of law to settle their respective claims (*d*).

Interpleader may be brought either in the High Court or in the County Court. In the former case the process is regulated by the seventeen rules under Order LVII. of the Supreme Court Rules (*e*). These rules contain the whole of the provisions relating to interpleader relief in the High Court; and they have all the force of an Act of Parliament. The jurisdiction of the County Court in interpleader depends upon the *County Courts Act*, 1888 (*f*), and Orders XXVII. and XXXIII. of the County Court Rules (*g*).

Interpleader relief may also be obtained in the Mayor's Court. Proceedings there are regulated by the *Mayor's Court of London Procedure Act*, 1857 (*h*).

(*d*) See Merlin's Law and Practice of Interpleader.
(*e*) Annual Practice, 1910, p. 892.
(*f*) 51 & 52 Vict. c. 43, sects. 120, 156, 157.
(*g*) Annual County Courts Practice, 1910, pp. 1077, 1086.
(*h*) 20 & 21 Vict. c. 157, sects. 32—35.

Proceedings in the High Court.—Where an owner of goods let out under a hire-purchase agreement makes a claim to any of his goods taken in execution by a sheriff, such claim must be in writing and must be served on the sheriff or his officer. On receipt of the notice of claim, the sheriff gives notice to the execution creditor. If the execution creditor does not admit the title of the claimant within four days, the sheriff applies for an interpleader summons calling on the claimant and the execution creditor to appear before the court to maintain their respective claims. The summons is returnable at chambers before a Master.

Before the return of the summons the owner (claimant) must prepare an affidavit setting out the grounds of his claim, and he must disclose a *primâ facie* title to the goods. A copy of the affidavit should be served on the sheriff and execution creditor before the return day.

Order LVII. should be consulted as to the various orders which may be made on the hearing of the summons (*i*).

Where the owner is made the plaintiff under an order, the onus is upon him at the trial to prove that he is entitled to the goods in his own right. The evidence he must produce is much the same

(*i*) Rules 7—12 ; see also Merlin, p. 161.

as that in an action for conversion of the goods. Claiming, as he does, under a hire-purchase agreement, he must be prepared to prove it strictly and to identify the goods seized as those named in the agreement or schedule thereto. A successful claimant is usually entitled to his costs as against an unsuccessful execution creditor (*k*).

Proceedings in the County Court.—Where the goods are seized to satisfy a judgment of a County Court, the owner should give notice in writing of his claim to the high bailiff, who must forthwith give notice to the execution creditor.

The high bailiff, also, gives notice to the owner (claimant) under sect. 156 of the *County Courts Act*, 1888 (*l*), requiring him to make deposit or give security in accordance with the section. In default of the claimant giving security or making deposit, the high bailiff must sell the goods as if no claim had been made to them and pay the money into court to abide the decision. It has already been noticed that the purchaser of such goods obtains a good title, though they were the property of the claimant at the time of the seizure (*m*).

If the execution creditor does not in due course

(*k*) See further, Merlin, p. 82.
(*l*) 51 & 52 Vict. c. 43, *ante*, p. 151.
(*m*) *Ante*, p. 152; *Goodlock* v. *Cousins*, [1897] 1 Q. B. 558.

admit the title of the claimant, the high bailiff applies for an interpleader summons.

The owner, five clear days before the return day, must deliver to the high bailiff, or leave at the registrar's office, two copies of the particulars of the goods alleged to be the property of the claimant and the grounds of the claim. The name, address and description of the claimant must be set forth in the particulars.

If the owner (claimant) claims damages from the execution creditor or the high bailiff in respect of the seizure, he must state in the particulars the amount he claims, and the grounds upon which he claims them.

The hearing in cases of interpleader is the same as in ordinary actions, the claimant being considered the plaintiff and the execution creditor the defendant. At the demand of either party a jury may be summoned as in other cases.

Replevin. — Replevin is a personal action to recover possession of goods unlawfully taken (generally applied, if applied at all, but not only applicable, to the taking of goods distrained for rent), the validity of which taking, it is the mode of contesting if the party from whom the goods were taken wishes to have them back in specie (*n*).

(*n*) Wharton's Law Lexicon, 10th ed., p. 657.

It was a Common Law remedy whereby the plaintiff obtained the specific goods, for if he proceeded by the ordinary action of detinue the defendant had, before the *Common Law Procedure Act*, 1854 (*o*), the option of paying the assessed value of the goods as damages and retaining the goods. Even now in an action for detinue an owner can only obtain possession of the goods after the successful termination of the action, and an owner wrongfully deprived of his goods may wish to have immediate possession, and this can be obtained by replevin upon his giving surety that he will pursue an action against the wrongdoer.

Replevin lies in respect of any wrongful seizure of goods (*p*). It lies for goods wrongfully taken as a distress due to the Crown (*q*) and for goods wrongly seized under the warrant of a justice acting without jurisdiction (*r*).

A wrongful taking is essential in replevin, although conversion or detinue will lie for the wrongful withholding of goods after lawful demand by the owner (*s*). From this it follows that in case of distress, the remedy of replevin is confined to the case of illegal distress as opposed to excessive

(*o*) 17 & 18 Vict. c. 125, sect. 78.
(*p*) *Gay* v. *Matthews*, 4 B. & S. 425.
(*q*) *Allen* v. *Sharp*, 2 Exch. 352.
(*r*) *George* v. *Chambers*, 11 M. & W. 149.
(*s*) *Mennie* v. *Blake*, 6 E. & B. 842.

or irregular distress. Fixtures cannot be replevied (*t*).

Sect. 2 of 2 *Will. & Mar. sess.* 1, *c.* 5, which first gave a landlord the right of sale over distrained goods (*u*), provides that such sale may take place five days after the distress, unless the tenant or *owner* of the goods replevied them according to law. It will be remembered that the above five days have since been extended to fifteen days if the tenant or *owner* so request in writing and give security for any additional costs incurred thereby (*x*). The right to replevy the goods remains up to the moment of sale.

Proceedings in replevin are now regulated by the *County Courts Act*, 1888, and the rules made thereunder (*y*). The owner (or tenant), called the replevisor, claiming the goods gives notice to the registrar of the County Court of the district in which any distress subject to replevin may be taken. An owner of goods wrongfully distrained upon should give notice to the registrar immediately after the distress has been put in. The notice should state whether the action is to be commenced in the County Court or in the High Court, and the

(*t*) *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454.
(*u*) *Ante*, p. 126.
(*x*) 51 & 52 Vict. c. 21, sect. 6, *ante*, p. 126.
(*y*) 51 & 52 Vict. c. 43, sects. 133—137; Ord. XXXIV., rr. 1—6; Annual County Courts Practice, 1910, pp. 504, 709, 1089.

names of the proposed sureties must be given, or in the alternative a statement that the claimant desires to give a bond or make deposit for security instead.

Upon security, in some form, being given the registrar issues a warrant to the high bailiff to replevy the goods and deliver them to the replevisor.

After security has been given and the goods replevied the owner must proceed with his action against the wrongdoer. Where he elects to sue in the County Court he must commence the action of replevin within one month from the date of the security. This is a condition of the bond or deposit. If, however, he desires to proceed in the High Court, the condition is to commence the action within one week from the date of security.

An owner, who has replevied goods wrongfully distrained and obtained judgment in an action of replevin, cannot afterwards maintain an action for damage in respect of the taking of the goods (*z*). However, in the action the jury may assess the damages as in an action for trespass (*a*).

(*z*) *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454.
(*a*) *Smith* v. *Enright*, 63 L. J. Q. B. 220.

CHAPTER XV.

Criminal Proceedings and the Restitution of Goods.

Criminal Proceedings.—If a hirer of goods under a hire-purchase agreement sells, pawns, or otherwise deals with the goods without the consent of the owner and before they became his property by the payment in full of the instalments agreed upon, he may be guilty of larceny as a bailee.

At Common Law a bailee, having obtained possession of the goods lawfully and *bonâ fide*, without any fraudulent intention, could not be found guilty of larceny by a subsequent fraudulent appropriation of the goods to his own use (*a*). In no case of a bailment where the possession was at first obtained in good faith could the bailee be found guilty of larceny (*b*).

Now sect. 3 of the *Larceny Act*, 1861 (*c*), provides :—

(*a*) Harris, Criminal Law, 11th ed., p. 206.
(*b*) *Reg.* v. *Hassell*, Leigh & C. 58.
(*c*) 24 & 25 Vict. c. 96.

"Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny; but this section shall not extend to any offence punishable on summary conviction."

Under this section a hirer of goods under a hire-purchase agreement can now be convicted for fraudulently appropriating or dealing with the goods in question. Where an infant over fourteen years of age fraudulently converted to his own use goods which had been delivered to him under an agreement of hire and purchase, it was held that he was rightly convicted of larceny as a bailee of the goods under the above section. It was argued on behalf of the prisoner that larceny as a bailee depends upon the existence of a contract of bailment, and that he, being an infant, was incapable of making such a contract, and therefore could not be guilty of the offence. It was held, however, that the infant being in possession of the goods was a bailee for the purposes of the section (*d*).

In order to obtain a conviction there must be evidence that the prisoner converted the goods to his own use, and it must be proved that he did so

(*d*) *The Queen* v. *McDonald*, 15 Q. B. D. 323.

without any claim of right, and with the intention of permanently depriving the owner of the goods. For instance, the fact that a hirer pawned the goods might not be, by itself, sufficient evidence of fraudulent intention, as he may have intended to redeem them (*e*); but other circumstances connected with the pawning may be taken into consideration as evidence on which the jury could find fraudulent intent.

Any person receiving goods from a hirer, and knowing that the hirer is fraudulently dealing with them, may be prosecuted and convicted either as an accessory after the fact, or as the committor of a distinct or substantive felony, whether the hirer (principal) has or has not been previously convicted (*f*). This is provided for by sect. 91 of the *Larceny Act*, 1861 (*g*), which enacts :—

"Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the

(*e*) *R.* v. *Wynn*, 16 Cox, C. C. 231.
(*f*) Harris, Criminal Law, 11th ed., p. 223.
(*g*) 24 & 25 Vict. c. 96.

latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour and with or without solitary confinement; and, if a male, under the age of sixteen years with or without whipping: provided, that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence."

A hirer in possession of goods under a hire-purchase agreement, who pawns the goods without the owner's consent, is liable to be convicted under sect. 33 of the *Pawnbrokers' Act*, 1872 (*h*).

This section provides that:—

"If any person knowingly and designedly pawns with a pawnbroker anything being the property of another person, the pawner not being employed or authorised by the owner thereof to pawn the same, he shall be guilty of an offence against this Act, and shall be liable, on conviction thereof in a court of summary jurisdiction, to forfeit any sum not exceeding £5, and, in addition thereto, any sum not exceeding the full value of the pledge as ascertained by the court.

"The forfeitures when recovered shall be applied towards making satisfaction thereout to the party injured, and

(*h*) 35 & 36 Vict. c. 93.

defraying the costs of prosecution, as the court directs; but if the party injured declines to accept such satisfaction and costs, or if there is any surplus of the forfeitures, then the forfeitures or surplus (as the case may be) shall be paid to the overseers of the poor of the parish or place where the offence is committed, for the use of the poor thereof."

If the goods are pledged for a temporary purpose, with a reasonable expectation of redeeming them, the offence is unlawful pawning; if, on the other hand, the hirer intended to permanently deprive the owner of them, it would be larceny (*i*).

A person wrongfully pawning the goods of another, who subsequently recovers the goods, is liable to proceedings under the section at the instance of the pawnbroker, although he has already been convicted of larceny of the goods (*k*).

Restitution of Goods.—In certain cases the court may order goods which have been stolen to be given up to the true owner. This power is now exercised under sect. 100 of the *Larceny Act*, 1861 (*l*), modified by sect. 24 of the *Sale of Goods Act*, 1893 (*m*).

Sect. 100 of the Larceny Act provides:—

(*i*) *R.* v. *Phetheon*, 9 C. & P. 552; *R.* v. *Medland*, 5 Cox, C. C 292.
(*k*) *Pickford* v. *Corsi*, [1901] 2 K. B. 212.
(*l*) 24 & 25 Vict. c. 96.
(*m*) 56 & 57 Vict. c. 71.

"If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in summary manner. . . . Provided also that nothing in this section contained shall apply in the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods, for any misdemeanour against this Act."

Sect. 24 of the Sale of Goods Act provides:—

"24. (1) Where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them by sale in market overt or otherwise.

"(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property

in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender."

The following is shortly the position of an owner of goods which have been stolen or obtained from him through false pretences.

If his goods have been stolen he may retake them wherever he finds them, for the property in the goods is still in him (*n*). Where, however, the goods have been sold in *market overt* (*o*) to a *bonâ fide* purchaser, they cannot be recovered from the purchaser unless the thief is prosecuted to a conviction (*p*). On the owner obtaining a conviction, the property in the goods revests in him by force of *sect.* 100 of the *Larceny Act*, 1861, and he can apply to the court for an order of restitution under the section, or he can bring an action against the purchaser to recover possession of the goods (*q*).

If the goods have been obtained by false pretences the position is somewhat different. The owner may, as in the case of larceny, retake the goods from the person who fraudulently obtained them, or from any person holding on his behalf. Moreover, under sect. 100 of the Larceny Act he could, formerly,

(*n*) *Blades* v. *Higgs*, 10 C. B. N. S. 713; see also *Burrows* v. *Barnes*, 82 L. T. 721, *ante*, p. 94.
(*o*) *Post*, p. 191.
(*p*) Sale of Goods Act (56 & 57 Vict. c. 71), sect. 24 (1).
(*q*) *Scattergood* v. *Sylvester*, 15 Q. B. 506.

upon a conviction of the fraudulent party, obtain an order for the restitution of the goods, from an innocent purchaser, in spite of the fact that he may have, as a result of the fraud, sold the goods and thus given a title to the fraudulent person, who in turn passed the property to the innocent purchaser.

This state of affairs was altered by sect. 24 (2) of the *Sale of Goods Act*, 1893 (*r*), which provides that, notwithstanding any enactment to the contrary (*s*), where goods have been obtained through fraud or means not amounting to a larceny, the property in such goods shall not revest in the person who was the owner by reason only of the conviction.

This section of the Sale of Goods Act does not apply to cases where the owner does not in fact part with the property in the goods, as he does in the case of a sale. For in the case of a sale, although the contract was induced by fraud, and therefore voidable at the option of the vendor, yet if possession is obtained under the contract by the fraudulent party, with the seller's consent, and then sold or pledged with an innocent person before the contract is avoided, the original owner cannot recover owing to his having parted with the property in the goods.

(*r*) Above.
(*s*) That is sect. 100 of the Larceny Act, 1861.

In the event of a simple hiring of goods the owner does not part with the property in the goods, and he can claim them therefore, in case of a fraudulent sale by the bailee, by his original title as owner and not by any possible revesting upon a conviction of the hirer.

The position of an owner of goods held under a hire-purchase agreement is materially affected by sect. 9 of the *Factors Act*, 1889 (*t*), and sect. 25 (2) of the *Sale of Goods Act*, 1893 (*u*). The law at present is that where the hire-purchase agreement does not amount to an agreement to buy goods within the meaning of these sections, the conviction of a hirer for larceny as a bailee revests the property in the goods in the owner, but if, on the other hand, the agreement does amount to an agreement to buy goods within the Acts (as in the case of *Lee* v. *Butler* (*x*)), a *bonâ fide* purchaser from the fraudulent hirer obtains a good title to the goods, and such title cannot be defeated by a conviction of the hirer for larceny as a bailee.

The above statement of the law depends upon the decision in the case of *Payne* v. *Wilson* (*y*), where—

The plaintiff let a piano under a hire-purchase agreement, by which the piano was to remain the property of

(*t*) 52 & 53 Vict. c. 45, *ante*, p. 29.
(*u*) 56 & 57 Vict. c. 71, *ante*, p. 30.
(*x*) [1893] 2 Q. B. 318 ; *ante*, p. 30.
(*y*) [1895] 1 Q. B. 653.

the plaintiff until all the monthly instalments provided for by the agreement were paid by the hirer. The agreement was identical in form with that in *Helby* v. *Matthews* (*z*). Before all the instalments were paid the hirer sold the piano to the defendant, who bought it in good faith and without notice of any lien or other right of the plaintiff. The hirer was prosecuted by the plaintiff for larceny as a bailee and was convicted. An application by the plaintiff under the Larceny Act, 1861, sect. 100, for restitution of the piano having been refused, the plaintiff sued the defendant for conversion of the piano :—

Held, that the hirer being a person who had agreed to buy the piano within the meaning of sect. 9 of the Factors Act, 1889, the delivery or transfer of the piano by him to the defendant had the same effect as though he were a mercantile agent in possession of it with the consent of the true owner ; that the property in the piano did not, on the hirer's conviction, revest in the plaintiff, and that the defendant had acquired a complete and permanent title to the piano.

The judgment in this case was, by consent, reversed on appeal (*a*) in view of the subsequent decision of the House of Lords in the case of *Helby* v. *Matthews* (*b*), but the decision stands as an authority, that where a hiring agreement amounts to a contract of sale within the meaning of the

(*z*) *Ante*, p. 33.
(*a*) [1895] 2 Q. B. 537.
(*b*) [1895] A. C. 471.

Factors Act, 1889, and the *Sale of Goods Act*, 1893, an innocent purchaser from a fraudulent hirer obtains a good title to the goods even after prosecution to conviction of the hirer. From this it follows that if the agreement is one drawn in usual form giving the hirer the right to determine the contract by returning the goods to the owner, it is a contract of hiring and not of sale, and the owner can obtain possession of the goods from an innocent purchaser, and the Acts in no way afford such purchaser protection.

The following proviso at the end of *sect.* 100 of the *Larceny Act*, 1861 (*c*)—"*provided also that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods for any misdemeanour against this Act*"—does not include a person who holds goods under a sale or hire agreement (*d*).

In cases where the court has power to order restitution, the order can only be made against a person actually in possession of the goods at the time of the conviction. It cannot be made against a purchaser who has sold them again before

(*c*) *Ante*, p. 182.
(*d*) *Payne* v. *Wilson*, [1895] 1 Q. B. at p. 659, *per* POLLOCK, B.

conviction, even with notice of the theft (*e*), though in such a case the court may order the restitution of the proceeds of the sale (*f*).

The court has an absolute discretion as to making an order of restitution or not (*g*). Where an order is refused by the court, an owner can enforce his right by action (*h*).

The *Pawnbrokers' Act*, 1872 (*i*), sect. 30, provides that:—

"In each of the following cases,—

"(1) If any person is convicted under this Act in a court of summary jurisdiction of knowingly and designedly pawning (*k*) with a pawnbroker anything being the property of another person, the pawner not being employed or authorised by the owner thereof to pawn the same:

"(2) If any person is convicted in any court of feloniously taking or fraudulently obtaining any goods and chattels, and it appears to the court that the same have been pawned with a pawnbroker:

"(3) If in any proceedings before a court of summary jurisdiction it appears to the court that any goods and chattels brought before the court have been unlawfully pawned with a pawnbroker:

(*e*) *Horwood* v. *Smith*, 2 T. R. 750.
(*f*) *R.* v. *Justices of the Central Criminal Court*, 17 Q. B. D. 598.
(*g*) *Vilmont* v. *Bentley*, 18 Q. B. D. 322.
(*h*) *Scattergood* v. *Sylvester*, 15 Q. B. 506
(*i*) 35 & 36 Vict. c. 93.
(*k*) Sect. 33, *ante*, p. 181.

the court on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or any part thereof, as to the court, according to the conduct of the owner and the other circumstances of the case, seems just and fitting."

By sect. 27 of the *Summary Jurisdiction Act*, 1879 (*l*), it is provided:—

"Where an indictable offence is under the circumstances in this Act mentioned authorised to be dealt with summarily,—

"(3) The conviction for any such offence shall be of the same effect as a conviction for the offence on indictment, and the court may make the like order for the restitution of property as might have been made by the court before whom the person convicted would have been tried if he had been tried on indictment."

Under the *Metropolitan Police Courts Act*, 1839 (*m*), sect. 40, a metropolitan police magistrate has power to order the delivery up of goods unlawfully detained, where the value of the goods does not exceed £15, within the limits of the Metropolitan Police District.

A person who obtains an order from a police magistrate under this section for the delivery up of goods unlawfully detained is not thereby excluded

(*l*) 42 & 43 Vict. c. 49.
(*m*) 2 & 3 Vict. c. 71.

from subsequently bringing an action for special damage incurred by the detention (*n*). If a magistrate refuses an order under the section, a plaintiff is not prevented from bringing an action in respect of the goods detained (*o*).

Market Overt.—A sale in market overt means a sale of goods in an open, public and legally constituted market place (*p*). In the City of London, and elsewhere when established by custom, a sale in an open shop of such goods as the shopkeeper professes to sell is a sale in market overt (*q*). A sale in a back room is not a sale in an open shop (*r*).

A sale in market overt enables a person to give a title to the goods under circumstances in which he could not do were the sale a private one. The effect of the *Sale of Goods Act*, 1893 (*s*), on sales in market overt has already been dealt with (*t*).

(*n*) *Midland Rail. Co.* v. *Martin & Co.*, [1893] 2 Q. B. 172.
(*o*) *Dover* v. *Child*, 1 Ex. D. 172.
(*p*) *Lee* v. *Bayes*, 18 C. B. 599.
(*q*) *Hargreave* v. *Spink*, [1892] 1 Q. B. 25.
(*r*) *Ibid.*
(*s*) 56 & 57 Vict. c. 71.
(*t*) *Ante*, p. 184.

APPENDIX OF FORMS.

1.

HIRE-PURCHASE AGREEMENT OF FURNITURE OR OTHER GOODS.

AN AGREEMENT made the day of 191 BETWEEN of (*hereinafter called* the owner) of the one part, and of (*hereinafter called* the hirer) of the other part.

WHEREBY IT IS AGREED as follows :—

1. The owner shall let on hire and the hirer shall take the chattels specified in the schedule hereto upon the terms and conditions following :—

2. The hirer shall :—

(*a*) Pay for the hire to the owner so long as the hirer thinks fit to continue the hire without previous demand the sum of £ per quarter in advance the first quarterly payment to be made on the signing hereof and the payment of each subsequent quarter to be paid at the expiration of each succeeding period of three calendar months :

(*b*) Keep the said chattels in good and substantial order (damage by fire included) in his own

custody at his address as given in this agreement and shall not sell remove or part with the possession of the same without the previous consent in writing of the owner :

(*c*) Permit all persons authorised by the owner at all reasonable times during the hiring to inspect the condition of the said chattels :

(*d*) Duly and punctually pay the rent rates and taxes payable for and in respect of the premises wherein the said chattels may for the time being be and produce the receipts therefor to the owner on demand :

3. If the hirer during the hiring :—

(*a*) Shall make default in punctually paying any quarterly instalment : or

(*b*) Shall be adjudicated a bankrupt or compound or arrange with his creditors : or

(*c*) Shall have any execution or distress levied on his goods or effects : or

(*d*) Shall fail to observe and perform the stipulations herein contained and on his part to be observed and performed : or

(*e*) Shall do or suffer any act or thing which may prejudice the owner's rights of ownership :

it shall be lawful for the owner to retake and resume possession of the said chattels and for that purpose to enter upon any premises occupied by the hirer :

4. The hirer may put an end to the hiring by returning the said chattels at his own cost to the owner :

5. If twelve quarterly payments shall be duly paid by the hirer in manner hereinbefore provided the said chattels shall become the property of the hirer but until such

payments shall have been made in full the same shall remain the property of the owner :

6. If the hiring is determined by the owner or by the hirer in manner herein provided all hire (and damages for breach of agreement) up to the date of such determination shall be paid by the hirer to the owner and no credit or allowance in respect of payments previously made shall be made or allowed to the hirer :

7. If the owner shall grant to the hirer any time or indulgence the same shall not affect the owner's strict rights under this agreement.

As WITNESS the hands of the parties the day and year first above written.

Signed by the said owner in the presence of
Signed by the said hirer in the presence of

THE SCHEDULE *above referred to.*
Particulars of Goods.

2.

HIRE-PURCHASE AGREEMENT OF PIANOFORTE.

(*Heading as in No.* 1.)

WHEREBY IT IS AGREED as follows :—

1. The owner shall let on hire and the hirer shall take a pianoforte bearing the name of and No. upon the terms and conditions following :—

2. The hirer shall :—

(*a*) Pay for the hire to the owner without demand so long as the hirer thinks fit to continue the hire the sum of £ on the day of every calendar

month the first of such monthly payments to be made on the day of next:

(*b*) Keep the said pianoforte in good and substantial order (damage by fire included) in his own custody at his address as given in this agreement and shall not sell remove or part with the possession of the same without the previous consent in writing of the owner:

(*c*) Permit all persons authorised by the owner at all reasonable times to inspect the condition of the said pianoforte:

(*d*) Have the pianoforte during the hiring properly tuned not less than a year:

or

(*d*) Pay to the owner during the hiring the sum of £1 per annum for tuning the said pianoforte four times yearly:

(*e*) Duly and punctually pay the rent rates and taxes payable for or in respect of the premises wherein the said pianoforte may for the time being be and produce the receipts therefor to the owner on demand:

3. If default shall be made in the punctual payment of the hire instalments specified above or if the hirer shall not observe and perform all and every of the terms and conditions of this agreement or shall suffer or do any act or thing whereby the owner's rights shall or may be prejudiced it shall be lawful for the owner to resume possession of the said pianoforte and for such purpose to enter into or upon any premises occupied by the hirer:

4. The hirer may put an end to the hiring by returning the said pianoforte at his own cost to the owner:

5. If monthly payments shall be duly paid by the hirer in manner hereinbefore provided the said pianoforte shall become the property of the hirer but until such payments shall have been made in full the same shall remain the property of the owner:

6. If the hiring is determined by the owner or by the hirer in manner hereinbefore provided all hire (and damages for the breach of this agreement) up to the date of such determination shall be paid by the hirer to the owner and no payment credit or allowance in respect of payments previously made shall be made or allowed to the hirer:

7. If the owner shall grant to the hirer any time or indulgence the same shall not affect or prejudice the owner's rights under this agreement.

In Witness, etc. (*Signatures of owner and hirer.*)

3.

Hire-Purchase Agreement of Carriage.

(*Heading as in No.* 1.)

Whereby it is Agreed as follows:—

1. The owner will let and the hirer will take on hire a carriage at the yearly rent of £ payable by equal quarterly instalments the first payment to be made on the signing hereof and the payment of each subsequent instalment to be made at the expiration of each succeeding period of three calendar months:

2. The hirer shall during the hiring:—

(*a*) Punctually pay to the owner without previous demand the said quarterly instalments:

(*b*) Keep the said carriage at his private residence and not during the hiring part with the possession or custody thereof or otherwise deal with the same:

(*c*) Keep the said carriage in good order repair and condition (damage by fire included) and not use the same for a greater load than that it is constructed for and permit the owner or his servants or agents at all reasonable times to inspect the same:

(*d*) Pay all duties and taxes payable for or in respect of the said carriage and keep the rent rates and taxes payable in respect of the premises on which the said carriage shall for the time being be regularly and punctually paid and upon demand produce to the owner or his servants or agents the current receipts for the same:

3. If the hirer shall make default in the punctual payment of any of the said quarterly instalments or in performing or observing any of the conditions of this agreement or if any execution or distress be levied on his goods or effects or if he shall be adjudicated bankrupt or file a petition in bankruptcy or a receiving order be made against him or if he shall execute an assignment for the benefit of or enter into any agreement or composition with his creditors then and in any such case it shall be lawful for the owner his servants or agents to retake and resume possession of the said carriage and for that purpose to enter upon any premises occupied by the hirer:

4. The hirer may at any time determine the hiring

by returning at his own cost the said carriage to the owner:

5. No allowance credit or payment shall be allowed returned or paid to the hirer in the event of the hiring being determined either under Clause 3 or Clause 4 hereof, the hirer shall pay to the owner full arrears of hire and damages (if any) for the breach of this agreement up to the date of such determination:

6. The owner hereby agrees that the hirer shall have the option of purchasing the said carriage at any time during the hiring on payment of the sum of £ and if the hirer shall exercise such option the owner will give the hirer credit against such purchase price for all payments which shall then have been made by him for hire.

7. If the owner shall grant the hirer any time or indulgence the same shall not affect or prejudice the owner's rights under this agreement.

4.

HIRE-PURCHASE AGREEMENT OF MOTOR-CAR.

AN AGREEMENT made this day of 19 BETWEEN Company Limited of (*hereinafter called* the owners) of the one part and of (*hereinafter called* the hirer) of the other part WITNESSETH that in consideration of the sum of £ now paid by the hirer to the owners for the option of purchase hereinafter contained (the receipt whereof the owners hereby acknowledge) and also in consideration of the rent

hereinafter reserved and of the provisions and stipulations hereinafter contained it is agreed as follows :—

1. The owners shall let and the hirer shall take on hire a H.P. motor-car chassis No. . The hirer will punctually pay to the owners at the owners' address without previous demand the sum of £ every calendar month by way of rent for the hire of the said motor-car, the first payment thereof to be made on the day of next and each subsequent payment to be made on the day of each succeeding calendar month.

2. The hirer shall duly and punctually pay all rent rates and taxes payable in respect of the premises where the said motor-car shall at any time during the continuance of this agreement be and shall during the continuance of the hiring keep the said motor-car in good repair and condition (reasonable wear and tear only excepted) and insure and keep insured the same against loss or damage by fire in the joint names of the owners and the hirer for the full value thereof in some recognised insurance office to be approved of by the owners and duly and punctually pay all premiums necessary for such insurance and produce the policy or policies of such insurance and the receipt for every such premium to the owners at any time on demand.

3. If default shall be made by the hirer in the payment of the said rent for days after the same shall have become due (whether payment thereof shall have been demanded or not) or if the hirer shall not perform or observe all the stipulations herein contained and on the part of the hirer to be performed or observed or shall make or purport to make any sale pledge charge or

other disposition of the said motor-car or if any distress for rent rates or taxes shall be levied on the goods of the hirer or if execution shall be levied upon his goods or if a receiving order shall be made against him or if the hirer shall make any assignment for the benefit of or compound with his creditors the whole of the said rents accrued and damages (if any) for the breach of this agreement shall immediately become due and payable and it shall be lawful for the owners without any previous notice to determine the hiring and it shall thereupon be lawful for the owners or their servants or agents at any time thereafter without previous notice to retake and resume possession of the said motor-car, and for that purpose to enter upon any premises occupied by the hirer.

4. The hirer shall have the option of purchasing the said motor-car for the sum of £ at any time during the continuance of this agreement in which case credit shall be given for the amount paid on the signing hereof and for all payments in respect of rent but no property or interest in the said motor-car except that of hire shall be vested in or passed to the hirer unless the hirer shall punctually pay the said rent and pay to the owners rents amounting in the aggregate with the sum paid on the signing hereof to the sum of £ .

5. If the owners shall grant to the hirer any time or other indulgence the same shall not affect or prejudice the owners' strict rights under this agreement.

As Witness, etc.

5.

HIRE-PURCHASE AGREEMENT OF MOTOR MACHINERY.

AN AGREEMENT made the day of 19 BETWEEN the Company Limited of (*hereinafter called* the company) of the one part and of (*hereinafter called* the hirer) of the other part.

WHEREBY IT IS AGREED as follows:—

1. The company hereby agree to let to the hirer and the hirer hereby agrees to hire from the company (which said motor is hereinafter called the "Hired Machine") for the term of years (subject to termination as hereinafter mentioned) upon the following conditions:—

2. The hirer shall:—

(*a*) Pay to the company for hire the sum of £ as follows viz.: £ on the signing hereof and the balance so long as the hirer thinks fit to continue the hiring by equal quarterly payments of £ each the first of such quarterly payments to be made on the day of next.

(*b*) Keep the Hired Machine at and shall not during the hiring part with the possession thereof or of the premises where the Hired Machine is to be kept without the previous consent in writing of the company.

(*c*) Keep the Hired Machine at his own expense in good order repair and condition (damage by fire included) and shall permit the company or its agents at all reasonable times to inspect the same.

(*d*) Keep the rent rates taxes and outgoings payable in respect of the premises on which the Hired Machine shall for the time being be regularly and punctually paid and shall upon demand produce to the company or its agents the current receipts for the same.

(*e*) At all times during the hiring keep affixed in a conspicuous position on the Hired Machine such plate as the company may provide for denoting that the Hired Machine is the property of the company.

(*f*) Insure the Hired Machine against fire in a recognised Fire Insurance Office to be approved of by the company in the sum of £ the agreed value thereof in the name of the company and on demand hand over to the company the policy and the receipt for all current premiums.

(3) If the hirer shall make default in punctual payment of the hire instalments or insurance premiums or in performing or observing any of the conditions of this agreement or if a distress or execution be levied on his goods or effects or if he shall be adjudicated bankrupt or file a petition in bankruptcy or a receiving order be made against him or if he shall execute an assignment for the benefit of or enter into any agreement or composition with his creditors then and in such case the company shall be at liberty to immediately terminate the hiring and may by its servants and agents enter upon any premises or place where the Hired Machine may be and retake possession of and remove the same notwithstanding any payments previously made by the hirer which payments shall be absolutely forfeited.

4. The hirer may at any time determine the hiring by returning at his own cost the Hired Machine to the company.

5. No allowance credit or payment shall be allowed returned or paid to the hirer in the event of the hiring being determined under the last two clauses but the hirer shall pay to the company full arrears of hire and damages (if any) for the breach of this agreement up to the date of such determination.

6. The company hereby agree that the hirer shall have the option of purchasing the Hired Machine at any time during the hiring on payment of the sum of £ if the option be exercised during the first year the sum of £ during the second year or the sum of £ if exercised during the third year and if the hirer shall exercise such option they will give the hirer credit against such purchase price for all payments which shall then have been made by him for hire.

7. If the company shall grant the hirer any time or indulgence the same shall not affect or prejudice the company's rights under this agreement.

As Witness, etc.

6.

Hire-Purchase Agreement of Gas-Engine.

(*Heading as in Nos.* 1 *or* 5.)

Whereby it is Agreed as follows :—

1. The owners hereby agree to let to the hirer and the hirer hereby agrees to hire from the owners a gas-

engine of H.P. No. complete with all fittings as set out in the schedule hereto.

2. The hirer shall pay to the owners so long as he thinks fit to continue the hiring without demand the sum of £ on the day of every calendar month for the hire of the said engine the first of such payments to be made on the day of next.

3. The hirer shall at all times during the hiring keep affixed in a conspicuous position on the said engine such name plate mark or number as the owners may provide for denoting that the said engine is their property.

4. The hirer shall during the hiring permit the owners or their agents at all reasonable times to enter upon any premises in which the said engine may for the time being be to inspect the said engine.

5. The hirer hereby agrees :—

(*a*) To keep the said engine at and during the hiring not to part with the possession thereof or of the said premises without the previous written consent of the owners.

(*b*) To keep at his own expense the said engine in good order repair and condition (damage by fire included) and not to make any alteration or addition thereto without the previous written consent of the owners.

(*c*) To keep the rent rates taxes and outgoings payable in respect of the premises on which the said engine shall for the time being be regularly and punctually paid and shall upon demand produce to the owners or their agents the current receipts for the same.

6. It is hereby declared that the owners have entered

into this agreement upon the express declaration by the hirer, and the hirer hereby expressly warrants that the premises upon which the said engine is to be placed are free from any mortgage, incumbrance, or charge given or created by the hirer or any person through whom he claims.

7. If the hirer at any time during the hiring shall be desirous of executing or creating any mortgage, incumbrance, or charge of or upon the premises in or upon which the said engine shall for the time being be he shall give to the owners one calendar month's previous notice in writing of his intention so to do, and upon the receipt of any such notice it shall be lawful for the owners to put an end to the hiring in manner herein provided.

8. If the hirer shall make default in punctual payment of any of the hire instalments or in performing or observing any of the conditions of this agreement or if a distress or execution be levied upon his goods or he shall be adjudicated bankrupt or file a petition in bankruptcy or a receiving order be made against him or if he shall execute an assignment for the benefit of or enter into any agreement or composition with his creditors then and in any such case the owners shall be at liberty to immediately terminate the hiring and may by their servants or agents enter upon and into any premises or place where the said engine may for the time being be and retake possession of and remove the same.

9. The hirer may at any time determine the hiring by returning at his own cost the said engine to the owners.

10. No allowance credit or payment shall be allowed returned or paid to the hirer in the event of the hiring

being determined under the foregoing clauses but the hirer shall pay to the owners full arrears of hire and damages (if any) for the breach of this agreement up to the date of such determination.

11. The owners hereby agree that the hirer shall have the option of purchasing the said engine at any time during the hiring on payment of the sum of £ and if the hirer shall exercise such option they will give the hirer credit against such purchase price for all payments which shall then have been made by him for hire. But until such purchase price shall have been paid in full the said engine shall remain the absolute property of the owners.

12. If the owners shall grant the hirer any time or indulgence the same shall not affect or prejudice the owners' rights under this agreement.

As Witness, etc.

7.

Hire-Purchase Agreement of Bicycle containing no Clause allowing the Hirer to determine the Hiring by returning the Bicycle to the Owner.

(*Heading as in No.* 1.)

Whereby it is Agreed as follows:—

1. That the owner shall let on hire and the hirer shall take a bicycle model height of frame inches gear tyres as shown in the owner's current trade catalogue at the price of £ .

2. The owner hereby acknowledges the receipt of the

sum of £ the first instalment and the hirer hereby agrees to pay the balance of the sum of £ by monthly instalments of £ each to the owner at the owner's address without previous demand on the day of each succeeding calendar month.

3. The hirer shall keep the said bicycle in good and substantial order (damage by fire included) in his own custody at his address given in this agreement and shall not sell remove or part with the possession of the same without the previous consent in writing of the owner.

4. If the monthly instalments shall be duly paid by the hirer in manner hereinbefore provided the said bicycle shall become the property of the hirer but until such payments shall have been made in full the same shall remain the property of the owner.

5. If the owner shall grant any time or indulgence the same shall not affect or prejudice the owner's rights under this agreement.

As Witness, etc.

8.

Hire-Purchase Agreement of Billiard Table, in Form of an Application.

(*Within Sect.* 9, *Factors Act*, 1889.)

To Messrs Date

Please supply me, Carriage Paid, at your risk, one Billiard Table, size , for which I enclose shillings pence, being amount of first instalment, and I agree to pay further *monthly instalments* of

shillings, and pence per month. I also agree not to dispose of the said Billiard Table and Accessories until all instalments are paid, when the Table becomes my absolute property.

Signature

Address

9.

GUARANTEE FOR THE PERFORMANCE OF CONTRACT BY HIRER.

IN CONSIDERATION of of having at my request, by a written contract dated the day of 19 agreed to lend on hire to of (*therein called* the hirer), goods specified in the schedule thereto, *I* the undersigned, HEREBY GUARANTEE to the said the due observance and performance by the said hirer of the several stipulations on his part to be observed and performed including the payment of the therein-mentioned monthly instalments. And I agree that this guarantee shall not be in anywise avoided, released, or affected by the said giving time to the said hirer or granting him any indulgence or by the said and the said hirer making any variation in the terms of the said contract provided that no variation shall make me liable for a greater maximum sum under this guarantee than that for which I am liable as the said written contract now stands.

AS WITNESS, etc.

10.

AGREEMENT BY LANDLORD NOT TO DISTRAIN ON HIRED GOODS.

To Messrs

In consideration of your having by a written contract dated the day of 19 , agreed to lend on hire to of my tenant, goods specified in the schedule thereto:

I, the undersigned his landlord, hereby undertake not to distrain, seize, or sell the said goods or to cause or allow the same to be distrained, seized, or sold for rent in arrear, and will not obstruct or hinder you the said from removing the said goods whenever you wish so to do.

(*Signature*)

AS WITNESS, etc.

11.

DECLARATION BY OWNER OF HIRED GOODS DISTRAINED UPON UNDER 8 EDW. VII. c. 53.

To (*the landlord or his bailiff distraining*).

Sir,

I of pursuant to the Law of Distress Amendment Act, 1908, do hereby declare that (*name of tenant*) occupying (*description of premises*) the immediate tenant of (*landlord's name*) has no right of property or beneficial interest in the furniture, goods, or effects distrained (*or* threatened to be distrained) upon for rent alleged to be due to the said (*landlord's name*) but that such furniture, goods, or chattels are my

property and are not goods or live stock to which the above Act is expressed not to apply. I annex a correct inventory of the furniture, goods, and effects above referred to.

Yours, etc.,
(*Signed*)

Dated the day of 19

Inventory above referred to.

(1)
(2)
(3)

(*Signed*)

Dated the day of 19

12.

DECLARATION AND UNDERTAKING BY UNDER-TENANT OR LODGER IN POSSESSION OF HIRED GOODS DISTRAINED UPON (8 EDW. VII. c. 53).

To (*Superior landlord or his bailiff*)

Sir,

I (*name of under-tenant or lodger*) occupying (*description of part of premises occupied*) as under-tenant (*or* lodger) pursuant to the Law of Distress Amendment Act, 1908, do hereby declare that (*name of tenant*) my immediate landlord the immediate tenant of (*name of superior land*) *lord*) has no right of property or beneficial interest in the furniture, goods, or chattels distrained (*or* threatened to be distrained) upon for rent alleged to be due to the said (*name of superior landlord*), but that such furniture, goods, or chattels are in my lawful possession and are

not goods or live stock to which the above Act is expressed not to apply.

The amount of rent now due to my immediate landlord is £ , and the times at which future instalments of rent will become due are the following :—

and the amount of each instalment is £ , and I hereby undertake to pay to the said (*name of superior landlord*) the rent so due or to become due to the said (*name of immediate landlord*) until the arrears of rent in respect of which the distress was levied, or authorised to be levied, have been paid off, and I annex a correct inventory of the furniture, goods and chattels above referred to.

Yours, etc.

(*Signed*)

Dated the day of 19

Inventory above referred to.

(1)
(2)
(3)

(*Signed*)

Dated the day of 19

13.

NOTICE TO SHERIFF OR HIGH BAILIFF OF CLAIM BY OWNER TO GOODS SEIZED UNDER A WRIT OF EXECUTION.

Take notice that the goods and chattels (*describe them*) at and in a certain house and premises situate and being No. of , in the county of , and which have been seized by you under a writ of execution at the suit of (*execution creditor*) as and for the goods

and chattels of (*execution debtor*) are not nor are any of them the property of the said (*execution debtor*) but the same are my property. And I hereby give you notice that I require you forthwith to deliver up possession of the same to same.

Dated this day of 19

To the Sheriff of the County of and his Under-Sheriff and all others whom it may concern.

or

To the High Bailiff of the County Court of holden at , and to his bailiff and officers and all others whom it may concern.

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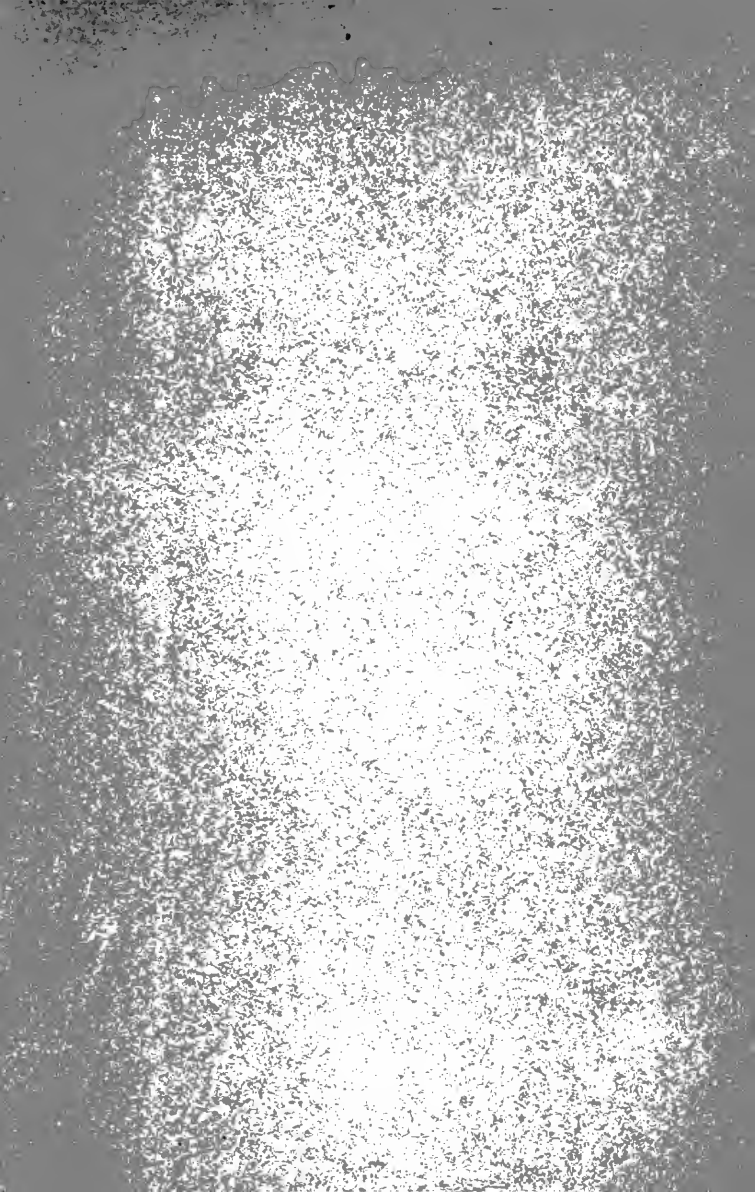

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